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RETROACTIVE APPLICATION OF SUPERFUND: CAN OLD DOGS BE TAUGHT NEW TRICKS?

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I. INTRODUCTION

According to the Environmental Protection Agency (EPA), 150 million metric tons of hazardous waste was generated across the nation in 1981. An additional two thousand pounds of hazardous waste was produced by small manufacturers, whose waste activities are not covered by agency regulations.[1] This massive amount of toxic chemicals has required federal, state and local governments to consider how and where to safely dispose of such wastes.[2] An even greater problem, one for which no exact statistics can be calculated, is the careless disposal of chemical wastes, which for decades has affected and will continue to affect human health and the environment. Toxic disasters involving abandoned waste sites are occurring more frequently. The problems of Love Canal, which was once considered an isolated environmental catastrophe, are occurring at an ever increasing rate.[3] In re-

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[1] N.Y. Times, Aug. 31, 1983, at A1, col. 3. Note that the small generator exemption from federal regulation has become one of the most hotly debated issues facing Congress this year. Proposed amendments to RCRA include a bill to remove this exemption so that small generators would be subject to the RCRA regulatory regime. *See* Cumming, *Legislative Outlook in the Senate: Finishing Unfinished Business*, 14 ENVTL. L. REP. 10002 (ENVTL. L. INST. 1984).

[2] In a recent assessment of 929 hazardous waste sites the EPA concluded that about twenty-five percent (25%) of the sites have documented evidence of damage to human health or the environment and about ninety percent (90%) of the sites have evidence of suspected or documented contamination. *See Inside EPA*, May 13, 1982, at 1 (hereinafter cited as *EPA study*).

[3] For a history of the Love Canal disaster, see 126 CONG. REC. S14. *See also, Love Canal, et al.: The Federal Government's Rights*, Responsibilities and Liabilities for the Damages From Chemical Dumps, 31 CATH. U.L. REV. 273 (1982).

A recent EPA study predicted that ninety percent of the wastes disposed of in 1980

sponse to this growing problem, Congress enacted the Comprehensive, Environmental Response, Compensation, Liability Act[4] (CERCLA). Congress hoped that such a program would fill in the gaps left by the other two major federal[5] vehicles for regulat-

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were done so improperly, "thereby presenting significant imminent hazards to the public health." Seltzer, *Personal Injury Hazardous Waste Litigation: A Proposal for Tort Reform*, 10 B.C. ENVTL. AFF. L. REV. 797, 798 (1983), *citing* B. BROWN, LAYING WASTE-THE POISONING OF AMERICA BY TOXIC CHEMICALS 2 (3d ed. 1980).

[4] 42 U.S.C. §§ 9601-9657 (1983).

[5] There are other federal statutes which may be used to impose liability for dumping chemical waste. The Safe Drinking Water Act (SDWA), section 1431, 42 U.S.C. § 300i (a) (1983), may be used upon evidence that a contaminant, likely to enter a public water system, may present an imminent and substantial endangerment to the health of persons. The Clean Air Act, section 303(a), 42 U.S.C. § 7603(a) (1983) provides the EPA with the authority to issue emergency abatement orders when "a pollution source or combination of sources" constitutes an imminent hazard. The Toxic Substances Control Act, section 7, 15 U.S.C. § 2606(a)(i) (1983), also provides an "imminent hazard" provision, which covers disposal activities. The statute's main use, however, has been to regulate the disposal of PCB's, pursuant to 15 U.S.C. § 2605(e)(1). *See generally* Mott, *Liability for Cleanup of Inactive Hazardous Waste Disposal Sites*, 15 NAT. RESOURCES LAW 379, 387-91 (1982).

Furthermore, although this article is limited in scope to federal law, liability may be imposed for improper waste disposal pursuant to state and local laws. The state may bring action against polluters under both federal law and their own state and local pollution control laws, which frequently are even more stringent than the federal statutes. Savings provisions are provided in all of the federal statutes discussed in this article.

RCRA section 3009, 42 U.S.C. § 6929 provides:

> [N]othing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.

See, e.g., State v. Rollins Environmental Services of Louisiana, Inc., 398 So.2d 1122 (La. 1981) ("State has exclusive jurisdiction over regulation of hazardous waste").

CERCLA section 114, 42 U.S.C. § 9614(a) similarly provides:

> [N]othing in this chapter shall be construed or interpreted as preempting any State from imposing additional liability or requirements with respect to the release of hazardous substances within such State.

In fact, thirty-six states have, to date, enacted fifty hazardous cleanup funds and related provisions. While some of these state "Superfunds" predated the federal act, most simply set forth some or all of CERCLA's response, compensation and liability provisions. *See State Superfund Statutes*, 1984 (ENVTL. L. INST. 1983). *See also* Warren, *State Hazardous Waste Superfunds and CERCLA: Conflict or Complement*, 13 ENVTL. L. REP. ~~10038~~ 10348 (ENVTL. L. INST. 1983).

CERCLA does, however, mandate certain limitations upon the use of both the federal and a state "Superfund." In section 114(b), 42 U.S.C.A. § 9614(b), a person is prohibited from receiving compensation for removal costs or damages from both federal Superfund (or other federal law) and from a state law. Moreover, except as otherwise provided, no person is required to contribute to any fund, the purpose of which is to pay compensation for claims for any response costs or damages or claims which may be compensated under Superfund. CERCLA section 114(c), 42 U.S.C. § 9614(c).

Section 311(o)(2) and (3) of the Clean Water Act, 33 U.S.C. § 1321(0)(1)-(3) that Act's

ing hazardous substances, the Clean Water Act[6] and the Resource Conservation and Recovery Act.[7]

Because the main goal of CERCLA is to promptly clean up abandoned waste sites,[8] many of its provisions are likely to be applied to transactions and events which culminated many years before the Act's enactment. Such a retroactive application of the law may be charged as unconstitutional, especially when parties are held liable for their waste activities[9] which were lawful prior to CERCLA's enactment. If this challenge to CERCLA is upheld, then the only available statutory mechanism expressly enacted to address the problem of abandoned and inactive waste sites[10] would be rendered essentially useless.

This Article will examine four constitutional bases for challenging the retroactive application of CERCLA: the due process clause of the fifth amendment,[11] the contracts clause,[12] the takings clause of the fifth amendment,[13] and the *ex post facto* doctrine.[14] The first three of these constitutional challenges are based upon the principle of substantive due process, which requires that legislation bear a rational relationship to a legitimate end of the government.[15] The *ex post facto* doctrine of the Constitution pro-

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savings provision, is identical to the analogous provisions in RCRA and CERCLA, except the Clean Water Act substitutes the word "section" for the word "chapter" as found in the latter two provisions. Thus, the Clean Water Act is arguably more restrictive than the other two statutes, as a state or local law or regulation could arguably be preempted by a provision found outside section 311. *See* Askew v. American Waterways Operators, Inc. 411 U.S. 325 (1973).

See generally Trauberman, *Compensation For Toxic Substances Pollution: Michigan Case Study*, 10 ENVTL. L. REP. (ENVTL. L. INST. 1980); Manatt & Phelps, *Statutory and Common Law Liability For Injury and Damage Caused By Releases of Hazardous Waste: A Study Conducted for the California Hazardous Waste Management Council* (Draft Report, 1983) (hereinafter Manatt Study); Rogers, *Liability Under RCRA's Regulatory System*, in EXPANDING LIABILITY IN ENVIRONMENTAL LAW 51 (A. Macbeth ed. 1981).

[6] 33 U.S.C. §§ 1251-1376 (1983).

[7] 42 U.S.C. §§ 6901-6987 (Supp. 1981).

[8] *See infra* text and notes at notes 29-55.

[9] Waste activities, for purposes of this article, constitute waste generation, transportation and disposal activities.

[10] *See infra* text and notes at notes 19-52.

[11] U.S. CONST. amend. V. ("No person shall be . . . deprived of life, liberty or property . . . without due process of law.")

[12] U.S. CONST. art. I, § 10. ("No State shall . . . pass any . . . law impairing the obligation of contracts.")

[13] U.S. CONST. amend. V. (". . . nor shall private property be taken for public use without just compensation.")

[14] U.S. CONST. art. I, § 9, cl. 3. ("No . . . ex post facto law shall be passed.")

[15] Nachman Corp. v. Pension Benefit Guaranty Corp., 592 F.2d 947, 960 (7th Cir. 1979). *See infra* text and notes at notes 134-85.

hibits Congress[16] and the state legislatures[17] from enacting laws, criminal in nature, which impair past transactions.[18] Despite these constitutional limitations, this article will conclude that the retroactive application of CERCLA is constitutional and necessary to effectuate the congressional intent to clean up abandoned waste sites.

II. FILLING IN THE "GAPS" WITH CERCLA

Prior to CERCLA's enactment, the major federal vehicles for regulating hazardous substances were the Clean Water Act[19] and the Resource, Conservation and Recovery Act[20] (RCRA). The goal of the Clean Water Act, as amended in 1972, was to eliminate pollutant discharges into the navigable waters by 1985. As with the comparable provisions of CERCLA,[21] the Clean Water Act provides the EPA with two enforcement options when hazardous substances are released into the environment: the government can either clean up the waste itself and then seek reimbursement from the responsible party, or it may order the cleanup administratively or through injunctive relief.[22]

RCRA was enacted in October of 1976, in response to public outcry over damage to the environment and public health due to the inadequate disposal of hazardous wastes.[23] The Act establishes a regulatory system to track hazardous substances from the time of their generation to the time of their disposal.[24] It also requires compliance with certain procedures to ensure the safe and secure treatment, storage and disposal of hazardous substances.[25] By regulating hazardous wastes from their "cradle" to their "grave," RCRA was intended to regulate the handling of hazardous wastes, which was considered "the last remaining

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[16] *See infra* text and notes at notes 261-75.

[17] There is a U.S. constitutional prohibition against state *ex post facto* laws. For purposes of this article, however, this provision will not be discussed. See U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . ex post facto law.")

[18] *See generally* 2 Sands, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 41.02 (4th ed. 1972). *See also infra* text and notes at notes 260-62.

[19] 33 U.S.C. §§ 1251-1376 (1983).

[20] 42 U.S.C. §§ 6901-6987 (Supp. 1981).

[21] 42 U.S.C. §§ 9604, 9607 (Supp. 1981).

[22] 33 U.S.C. § 1321(b)(1) (1983).

[23] *See* H. REP. NO. 1491, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6238.

[24] 42 U.S.C. §§ 6921-6934 (Supp. 1981).

[25] *Id.* §§ 6923-6925.

loophole" in environmental law.[26] By far the most widely litigated provision of RCRA is section 7003, commonly referred to as the "imminent hazard" provision.[27] This section provides the EPA with the broad authority to bring suit in federal district court to "restrain persons from contributing to any waste activities which may present an imminent and substantial endangerment to health on the environment."[28]

In the aftermath of the Love Canal[29] and other hazardous waste disasters, it became obvious, however, that neither the existing legislation[30] nor the common law[31] were adequate to clean

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[26] H. REP. NO. 1491, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6238, 6241.

[27] 42 U.S.C. § 6973 (Supp. 1981).

[28] *Id.* Defining the term "imminent and substantial endangerment" is in and of itself a thorny issue. One court defined it as "that sort of emergency situation in which application of the general provisions of the Act would be too time-consuming to effectively ward off the threatened harm to health or environment." *See* United States v. Hardage, No. CIV-80-1031-W, slip op. (W.D. Okla. Sept. 29, 1982). *See also* United States v. Reilly Tar and Chemical Co., 546 F. Supp. 1100, 1110-11 (D. Minn. 1982). The general consensus of the courts has been to follow this principal and hence in order to state a cause of action under section 7003, the government need only prove that the present condition poses a clear threat to human health and the environment.

The legislative histories of the "imminent hazard" provisions of section 118 of the Clean Air Act, 42 U.S.C. § 7603, section 504 of the Clean Water Act, 33 U.S.C. § 1364 and section 1431 of the Safe Drinking Water Act, 42 U.S.C. § 300(i)(a), are frequently utilized by both courts and scholars to better understand RCRA section 7003. *See* Hinds, *Liability Under Federal Law for Hazardous Waste Injuries*, 6 HARV. ENVTL. L. REV. 1, 16-18 (1982); *Hazardous Waste: EPA, Justice Invoke Emergency Authority Common Law Litigation Campaign Against Dumpsites*, 10 ENVTL. L. REP. 10034, 10037 (ENVTL. L. INST. 1981).

[29] *See supra* note 3.

[30] *See generally* H. REP. NO. 1016, 96th Cong., 2d. Sess., pt. I, at 18, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6119, 6120; S. REP. NO. 848, 96th Cong., 2d. Sess. 10-12, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6119. *See also* Comment, *Generator Liability Under Superfund For Clean-Up of Abandoned Hazardous Waste Dumpsites*, 130 U. PA. L. REV. 1229, 1231 (1982). (hereinafter cited as Comment, *Generator Liability*.)

[31] An injured party may bring suit under the common law tort system utilizing the theories of nuisance, trespass, negligence, strict liability and inverse condemnation. These theories have not, however, proven adequate due to the usually successful defenses of causation, statute of limitations, reasonableness of conduct, assumption of risk and contributory negligence. For a general discussion of the uses of state common law tort theories and the defenses thereto in environmental causes *See* Trauberman, *supra* note 6 at 50021; Trauberman, *Compensating Victims of Toxics Substances Pollution: An Analysis of Existing Federal Statutes*, 5 HARV. ENVTL. L. REV. 1 (1981); Comment, *Hazardous Waste: Preserving the Nuisance Remedy*, 33 STAN. L. REV. 675 (1981); Note, *An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries*, 12 RUTGERS L. J. 117 (1980); Ginsberg, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859 (1981); Fabic, *Pursuing a Cause of Action in Hazardous*

up these and the many other yet to be discovered abandoned dump sites. Recognizing these inadequacies and the intense public discontent with the existing regulatory system, Congress, in December, 1980, enacted CERCLA,[32] which ideally[33] was to be the statutory answer to the abandoned waste site problem.

The Act provides two alternative mechanisms by which the government can clean up abandoned sites. The first is the Act's Hazardous Substances Response Fund, commonly referred to as the Superfund. The fund, financed jointly by industry and the federal government,[34] is utilized to compensate state and federal governments[35] for costs incurred as a result of containment, re-

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Waste Pollution Cases, 29 BUFFALO L. REV. 533 (1980); Hurwitz, *Environmental Health: An Analysis of Available and Proposed Remedies For Victims of Toxic Waste Contamination*, 7 AM. J. LAW MED. 61 (1981); Baurer, *Love Canal: Common Law Approaches to a Modern Tragedy*, 11 ENVTL. L. 131 (1980). *See also* Hinds, *supra* note 28, at 14 n.105; Manatt Study, *supra* note 5, at 104-208, for discussion of damages under common law.

[32] 42 U.S.C. §§ 9601-9657.

[33] CERCLA has not been without its critics. *See generally Special Report, Superfund—How to Rebuild a Badly Damaged Program*, ENVIRONMENTAL FORUM, June, 1983. Most of the criticisms of CERCLA are premised upon the statute's failure to provide for private victim compensation. The "Section 301(e) Panel" set up pursuant to 42 U.S.C. § 9651(e) was instructed by Congress "to determine the adequacy of existing common law and statutory remedies providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment." The Committee's "two tier" recommendations can be summarized as follows: (1) Special taxes on chemical and oil industries to finance the fund (Tier I); and (2) Amendments to existing state personal injury laws, including endorsement of a liberal discovery rule. *See generally, Compensating Victims of Environmental Poisons*, ENVIRONMENTAL FORUM 3 (Jan. 1983) Outen, *Injury from Hazardous Chemicals: Compensating Innocent Bystanders*, ENVIRONMENTAL FORUM 6 (Feb. 1983); Garret, *Compensating Victims of Toxic Substances: Issues Concerning Proposed Federal Legislation*, 13 ENVTL. L. REP. 10172 (ENVTL. L. INST. 1983); Grad, *Hazardous Waste Victim Compensation: The Report of the* § 301(e) *Superfund Study Group*, 13 ENVTL. L. REP. 10234 (ENVTL. L. INST. 1983); Anderson, *The Case for Statutory Compensation*, ENVIRONMENTAL FORUM 21.

Legislation has been introduced incorporating some or all of the Committee's recommendations. *See generally*, G. Nothstein, *Toxic Torts: Litigation of Hazardous Substances Cases*, § 10.17 (1984); Cummings, *supra*, note 1, at 10007; *Compensating Toxics 'Victims'*, ENVIRONMENTAL FORUM 15 (July, 1983).

Model legislation has also been drafted. *See* Trauberman, *Statutory Reform of Toxic Torts: Relieving Legal, Scientific and Economic Burdens on Chemical Victims*, 7 HARV. ENVTL. L. REV. 1 (1983); *See also* Manatt Study, *supra* note 5, at 266-85.

Adverse reaction to these legislative proposals has been generated mainly by insurance and industry organizations. *See* Cheek, *Solutions to a Non-Existent Problem*, ENVIRONMENTAL FORUM 6 (Mar. 1983); Baron, *Compensation, Yes, But Not to the Exclusion of Common Tort Remedies*, ENVIRONMENTAL FORUM at 21. *See also* 13 ENVTL. REP. 375 (BNA); 14 ENVTL. REP. 523 (BNA), for reactions of industry representatives.

[34] 42 U.S.C. § 9631.

[35] *See* City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (D.C. Pa. 1982) wherein a non-governmental entity and local government were permitted to file suit for

moval and cleanup of wastes from abandoned sites when the responsible parties are unknown or unable to undertake those remedial measures.[36] Using the $1.6 billion trust fund, EPA is authorized, under section 104[37] of the statute, to conduct cleanup activities. These activities are financed pursuant to section 107,[38] which authorizes EPA to seek reimbursement for some or all of its costs from a variety of parties that are presently or were previously[39] associated with the site. At the time of CERCLA's enactment, the Fund was seen by some legislators as the key solution to the abandoned dump site problem:

> This fund is to be used to find, assess and, where warranted, clean up abandoned hazardous waste sites when the company or companies responsible for creating the problem either no longer exist, cannot be identified or lack the financial resources to clean up their own messes. Residents of areas affected by such "orphan" dumps simply have no place else to turn for abatement of this problem, which has led to poisoned drinking water, increased incidence of cancer, birth defects, miscarriages, skin ailments and respiratory ailments.[40]

In its enforcement of CERCLA, EPA has not relied on section 107, largely because the estimated cost of cleanup for all sites would come to an approximate $25 to $44 billion.[41] In the alternative, EPA has relied considerably upon section 106, which provides EPA with the option to force others to do the cleanup by request-

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reimbursement of "response costs" after initiating clean-up activities. In addition, that court held that such parties may bring a section 107 action against waste generators despite the fact that the city was potentially liable to the federal government as the owner of the contaminated site. *See also* United States v. Reilly Tar and Chemical Corp., 546 F. Supp. at 1100, wherein the court upheld a CERCLA section 107 claim by the federal, state and local governments against a waste disposer whose improper dumping caused contamination of groundwater. *See also In re* Claim of Atlantic City Municipal Utilities Authority, ENVTL. L. REP. PEND. LIT. 65807 (ENVTL. L. INST.) (claim filed Nov. 17, 1983).

[36] 42 U.S.C. § 9612(b)(1)(B).

[37] *Id.* at § 9604.

[38] *Id.* at § 9607.

[39] For a discussion of which pre-enactment parties may be subject to liability, *see generally* Manatt Study, *supra* note 5, at 56; Hinds, *supra* note 5, at 20-21; Mott, *supra* note 4, at 379.

[40] *Administration Testimony to the Subcomm. on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works*, 96th Cong., 2d. Sess. 93 (statement of Thomas Jorling, Ass't Administrator, Water and Waste Mgt. EPA) (hereinafter cited as *Hearings*).

[41] *See* Orloff, *Superfund and The Courts*, ENVIRONMENTAL FORUM 5 (Jan. 1983).

ing an injunction in court or by itself issuing an administrative order.[42]

Recent court decisions reflect this congressional intent and have held that CERCLA, particularly as opposed to RCRA, is the proper statutory mechanism for imposing liability upon parties who, prior to the Act's enactment, contributed to[43] disposal activities. In *United States v. Waste Industries*,[44] for example, the court disallowed the use of RCRA section 7003 to force either the operator of a closed waste dump or the then current owner of the property upon which the abandoned site was situated to abate the pollution of groundwater by chemicals leaching from the site.[45] The court supported its holding by pointing to the fact that the language of section 7003 was couched in the present tense. Furthermore, the court found that the section's structure implied a congressional intent not to use RCRA as the remedy to problems of abandoned and inactive waste dumps.[46] The main thrust of the court's decision appears to come from its discussion of CERCLA. In particular, the court saw the passage of CERCLA as Congress' remedy to the problem of inactive waste disposal sites:

> First, Congress recognized that . . . a gap existed in the regulatory scheme fashioned through RCRA. That gap involved the problems caused by the inactive waste disposal sites. Second, the Superfund legislation was designed to fill that void. Third, . . . the passage of Superfund without and instead of an amendment to section 7003 demonstrates the inapplicability of that provision to [abandoned waste sites].[47]

To the court, the application of RCRA to abandoned or inactive waste sites is unnecessary because Congress explicitly enacted Superfund for that purpose.

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[42] *Hearings*, *supra* note 40, at 62.

[43] The "contributing to" standard is taken from the language of RCRA section 7003, 42 U.S.C. § 6973, and will be used generally throughout this article.

[44] United States v. Waste Industries, 556 F. Supp. 1301 (D.N.C. 1982). *See also* Rogers, *Three Years of Superfund*, 13 ENVTL. L. REP. 10361 (ENVTL. L. INST. 1983); Reed, *RCRA's Imminent Hazard Provision and Inactive Hazardous Waste Dumps: A Reappraisal After U.S. v. Waste Industries*, 13 ENVTL. L. REP. 10074 (ENVTL. L. INST. 1983).

[45] *See* Reed, *supra* note 44, at 10074.

[46] In particular, the Court noted that because section 7003 is found under the "Miscellaneous Provisions," following the citizens suit provision, which provides no substantive standards, and only establishes standing, it too was only jurisdictional and "was not designed to remedy past acts." Reed, *supra* note 44, at 10077.

[47] United States v. Waste Industries, 556 F. Supp. at 1317.

Similarly, in *United States v. Reilly Tar & Chemical Corp.*,[48] EPA sought relief, pursuant to CERCLA section 106, against a waste generator who was also the owner and operator of the disposal facility. The generator was charged with contaminating groundwater caused by the leaching of chemicals from the dump site.[49] Reilly Tar sought dismissal by arguing, *inter alia*, that section 106 does not extend to prior owners of an inactive disposal site. The court rejected the argument, and stated:

> Section 106(a) is broader in scope than section 7003 of RCRA, and whatever concerns the court has regarding the applicability of section 7003 to *prior owners* of inactive sites does not apply to section 106(a). Section 106(a) . . . contains no limitations on the classes of persons within its reach. Nor does it contain language indicating that it applies only to present owners of waste disposal sites.[50] (emphasis added)

This judicial tendency to favor CERCLA as the proper mechanism for regulating abandoned dumps has been more recently followed in *United States v. Wade* (*Wade I*).[51] In that case the United States brought suit under CERCLA section 106 and RCRA section 7003, for recovery against the owners of the waste site, the waste transporters and six past off-site generators.[52] In considering these claims the court focused its analysis upon the overall structure of CERCLA, particularly the liability provision of section 107.[53] Following *Waste Industries*, the *Wade I* court concluded that CERCLA rather than RCRA was intended by Congress to be the primary mechanism for the cleanup of abandoned waste sites:

> CERCLA was specifically designed to *plug gaps* in the government's then existing anti-pollution program. In particu-

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[48] United States v. Reilly Tar, 546 F. Supp. at 1113. *See generally* Orloff, *supra* note 41, at 6-7.

[49] In addition to its claims under section 106, the United States, along with the State of Minnesota and the City of St. Louis Park, brought suit under RCRA section 7003 and CERCLA section 107. The state and local governments also alleged a number of claims pursuant to state and local statutes and regulations. United States v. Reilly Tar. 546 F. Supp. at 1105.

[50] United States v. Reilly Tar, 546 F. Supp. at 1113.

[51] United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982) (Wade I). *See generally* Reed, *supra* note 44, at 10077; Orloff, *supra* note 41, at 6; Manatt Study, *supra* note 5, at 56.

[52] The EPA initially brought suit against both the owners of the site and the transporters of the waste. On November 10, 1981, however, the agency amended its complaint to include six past off-site generators as additional defendants. *See* Orloff, *supra* note 41, at 6.

[53] Wade I, 546 F. Supp. at 787.

> lar, it *was designed to deal squarely with the problem of abandoned or 'orphan' hazardous waste dumps*, a problem which RCRA had not adequately addressed.[54] (emphasis added)

The court, however, rejected the claims under section 106 and section 7003 and held sections 104 and 107 as the proper statutory authority to support an action against a past-generator.[55]

In light of the Act's legislative history and numerous court decisions, it is reasonable to conclude that CERCLA is the proper statutory solution for the EPA to consider when presented with an abandoned waste site problem. Thus, for purposes of analyzing retroactivity challenges, this article will be limited in its scope to CERCLA.

III. RETROACTIVE APPLICATION OF CERCLA

The imposition of financial liability pursuant to Superfund sections 106 and 107, where injunctive relief is sought against parties who, prior to the enactment of the Act, contributed to waste activities, can be challenged as unconstitutionally retroactive.[56] A retroactive statute[57] is generally defined as "one which gives to pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute."[58] Such statutes are usually highly suspect as "there is a general consensus among all people that notice or warning of the rules that are to be applied to determine their affairs should be given in advance of the actions whose effects are to be judged by them."[59]

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[54] *Id.* at 792, *quoting* H.R. 1016, 96th Cong., 2d Sess. § 25 (1980); S. REP. NO. 848, 96th Cong., 2d Sess. 11 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6119.

[55] Wade I, 546 F. Supp at 793.

[56] For a comprehensive analysis of these arguments, written for industry defense purposes, *see* KIRKLAND & ELLIS, SUPERFUND: KEY LIABILITY ISSUES, prepared for the Chemical Manufacturers Association, at Chapter VI (1982) (hereinafter cited as CMA/Superfund Study). *See also* Manatt Study, *supra* note 5, at Chapter IV. *But see* Comment, *Generator Liability supra* note 30 at 1234-50.

[57] Throughout this article, the terms "retroactive" and "retrospective" will be used interchangeably.

[58] Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960). An oft-quoted definition of retroactivity is that of Justice Story in Society for Propagating the Gospel v. Wheeler, 22 F.Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13, 156) *quoted in* Sturges v. Carter, 114 U.S. 511, 519 (1884): "[E]very statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

[59] Sands, *supra* note 18, at 492. *See also* Hochman, *supra* note 58, at 492; Smith, *Retroactive Laws and Vested Rights*, 6 TEXAS L. REV. 409 (1928).

Generally disfavored, retroactive legislation has been likened to "dog law"—training dogs by waiting until they act in some forbidden way and then punishing them for their conduct.[60]

The principal constitutional limitations on Congress' power to enact retroactive legislation are, in the civil context, founded on the due process clause of the fifth amendment, the contract clause of article I, section 10 as incorporated by the due process clause, and the takings clause of the fifth amendment. In addition, pursuant to the constitutional prohibition in article I, section 9 against *ex post facto* laws, Congress is forbidden from applying criminal penalties retroactively. However, unlike the *ex post facto* doctrine and contract clauses, which provide explicit constitutional prohibitions against retroactive laws, the due process clause fails to delineate any express criteria to determine when retroactive legislation is unconstitutional.[61]

In any case, each of these doctrines arguably could be applied to invalidate various provisions of Superfund. First, the imposition of liability pursuant to section 104 may attach to pre-enactment conduct a new duty or obligation and as such violate the waste contributor's due process rights under the fifth amendment.[62] Second, by imposing liability upon generators and transporters of waste for the damages caused by improper disposal, section 107 effectively obliterates pre-enactment contractual agreements to release any one of the above enumerated parties from liability for such damages.[63] Third, many of the administrative orders, when applied retroactively, may in essence constitute a "total physical invasion" of the waste-site owner's property, thereby violating that person's rights under the takings clause.[64] Finally, the Superfund provisions which impose fines and treble punitive damages upon pollutors who fail to comply with administrative orders may arguably violate the *ex post facto* clause if applied retroactively.[65]

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[60] *Sands, supra* note 18 at § 41.02, *citing*, BOWRING, WORKS OF JEREMY BENTHAM V 235 (1962).

[61] J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § VI, 471 (2d ed. 1983) (hereinafter cited as NOWAK, CONSTITUTIONAL LAW).

[62] *See infra* text and notes at notes 107-92.

[63] *See infra* text and notes at notes 93-120.

[64] *See infra* text and notes at notes 21-60.

[65] *See infra* text and notes at notes 61-75. Note that this same argument based upon the *ex post facto* doctrine may be used against RCRA, 42 U.S.C. § 6973(d) and (e) and the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(a)(1) and (a)(3).

Not until 1983 did any federal court[66] faced with a CERCLA challenge[67] have to analyze the Act to determine whether it could be applied retroactively to impose liability upon contributors to pre-enactment waste activities. In *State of Ohio v. Georgeoff*[68] (*Georgeoff*) the United States District Court for the Northern District of Ohio reached an unprecedented holding that CERCLA section 107 may be applied retroactively to impose liability upon

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[66] *See* State Dept. of Environmental Protection v. Ventron Corp., 440 A.2d 455 (New Jersey 1982), *aff'd in part*, No. A 50/51, 13 ENVTL. L. REP. 20837 (ENVTL. L. INST. 1983). *See infra* note 94.

[67] Numerous retroactivity challenges have been brought in RCRA cases. *See, e.g.*, United States v. Diamond Shamrock, No. C80-1857, 12 ENVTL. L. REP. 20819, 20822 (N.D. Ohio May 29, 1981) wherein the court held with regard to RCRA section 7003:

> The tangential issue of whether § 6973 as applied to antecedent acts creates an impermissible retroactive application must be answered negatively. Section 6973 provides for injunctive relief, as opposed to compensatory or punitive relief, of conditions presently existing. To hold that remedial environmental statutes could or should not apply to conduct engaged in antecedent to the enactment of such statutes, when the effects of such conduct create a present environmental threat, would constitute an irrational judicial foreclosure of legislative attempts to rectify pre-existing and currently existing environmental abuses.

See also United States v. Price (Price I), 523 F. Supp. 1055, 1072 (D.C.N.J. 1981) ("Because the gravamen of a 7003 action is the current existence of hazardous condition, not the past commission of any acts, we see no retroactivity problem with the statute."); United States v. Reilly Tar Chemical Corp., 546 F. Supp. at 1108. ("Although Reilly Tar no longer engages in ongoing activities at the site, this is no basis for dismissing the action . . . [RCRA] is aimed at the prevention or amelioration of harmful conditions, rather than the cessation of any particular human conduct.") Note that in United States v. Solvents Recovery Service of New England, 496 F. Supp. 1127 at 1142 (D.C. Conn. 1980) the court, in rejecting the defendant's argument that the imposition of section 7003 liability to pre-RCRA activities was unconstitutionally retroactive, applied a different mode of analysis. That court interpreted section 7003 as being jurisdictional thereby incorporating the federal common law of nuisance rather than imposing new substantive liabilities. Since that court found that "the federal common law of nuisance is not likely to exceed significantly in scope or severity the state law of nuisance to which the defendants were already subject when they engaged in their pre-RCRA disposal practices" the section was not impermissibly retroactive. Thus that court did not even require an allegation of ongoing acts of disposal.

There are two potential problems with this line of analysis. First, even assuming that section 7003 is, as the *Solvents* court held, jurisdictional, a court in another state may still face the defense of retroactivity if the application of the federal common law of nuisance exceeds the severity of that state's common law. *See* Duke, *Using RCRA's Imminent Hazard Provision in Hazardous Waste Emergencies*, 9 ECOLOGY L. Q. 599, 616 (1981). Second, if, as other courts have held, section 7003 is construed as substantive then the question remains as to whether the standards set forth in that provision are themselves more stringent than the common law principles being applied in the state in which the injury has occurred.

[68] State of Ohio v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio 1983). *See also* United States v. Stringfellow, No. CV-83-2501-MML, 14 ENVTL. L. REP. 20388 (C.D. Cal. Apr. 9 1984).

hazardous waste transporters.[69] Despite this holding, the court failed to consider the constitutionality of retroactivity. Most recently, however, in *United States v. Northeastern Pharmaceutical and Chemical Co., Inc.*[70] (*NEPACCO*), the United States District Court for the Western District of Missouri held that the retroactive application of CERCLA sections 106 and 107 did not violate the defendant's due process rights under the fifth amendment. That court, however, was not presented with constitutional challenges to CERCLA under either the contracts clause, the takings clause, or the *ex post facto* doctrine. As a result, challenges brought pursuant to these provisions remain viable for defendants in CERCLA actions.

After an overview of the court's opinion in *Georgeoff*,[71] this article will analyze the court's opinion in *NEPACCO*.[72] In addition to that court's justification, this article will provide a more detailed discussion of additional reasons why the retroactive application of CERCLA should be held constitutional under the due process clause of the fifth amendment.[73] This article will then analyze the other three constitutional limitations upon retrospective application of CERCLA. It will conclude that none of these doctrines are strong enough to overcome CERCLA's constitutionality.[74]

A. State of Ohio v. Georgeoff

The issue in *Georgeoff* was whether section 107 of CERCLA may be applied retroactively to impose financial liability upon pre-enactment waste transporters. The State of Ohio (Ohio) and the United States Justice Department (Justice) brought suit

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[69] The fact that the holding in the *Georgeoff* case is limited to transporters of waste materials is an important one, especially when the constitutionality of the decision is considered. Generators may be in a better position to raise these constitutional objections than will transporters and dumpsite operators.

[70] United States v. Northeastern Pharmaceutical & Chemical Co., Inc., 579 F. Supp. 823 (W.D. Mo. 1983).

[71] *See infra* text and notes at notes 75-106.

[72] *See infra* text and notes at notes 115-32.

[73] *See infra* text and notes at notes 134-92.

[74] For discussion of CERCLA's constitutionality under the contracts clause, *see infra* text and notes at notes 193-221. For a discussion of CERCLA's constitutionality under the takings clause, *see infra* text and notes at notes 224-60. *See infra* text and notes at notes 261-75 for a discussion of CERCLA's constitutionality under the *ex post facto* doctrine.

against Browning-Ferris Industries (BFI) and others[75] *inter alia*, to collect the costs related to the cleanup of the "Deerfield Dump" (Dump). From 1975 to 1976, BFI transported an assortment of chemical wastes to the Dump. In its motions to dismiss, BFI asserted that the liability provisions of CERCLA, specifically section 107(a), should not be construed to impose liability retroactively for pre-enactment acts of transporters.[76] The court disagreed, and in reaching its conclusion, addressed the following issues: 1) whether the retroactive application of CERCLA is necessary; 2) what presumptions apply in determining whether CERCLA should be interpreted to impose retroactive liability; and 3) whether Congress has overridden the presumption against applying CERCLA retroactively.

With regard to the first issue, Ohio and Justice set forth two alternative arguments as to why a retroactive application of section 107 would be unnecessary. Ohio alleged that there were certain cases in which statutes were not held to be retroactive even though the imposition of liability pursuant to such statutes was premised solely upon past acts.[77] Ohio relied upon the following proposition:

> 'a statute is not rendered retroactive merely because facts or requisites upon which the act's subsequent action depends or some of them, are drawn from a time antecedent to enactment.'[78]

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[75] The defendants fell into three categories—the former owners and operators of the Dump, the generators of the hazardous waste located at the Dump, and the transporters of the hazardous wastes to the Dump. In a forty-two page complaint, Ohio alleges fourteen causes of action against forty-two defendants. The first three allege violations of CERCLA. In the opinion discussed herein, the court considered BFI's (the transporters') motions for dismissal of those three counts.

[76] BFI's second set of arguments focused on the mandatory prerequisites to bringing suit, set forth in 42 U.S.C. § 9607(a). In particular, BFI argued that (1) Ohio did not meet its burden of showing actions "not inconsistent with the National Contingency Plan;" (2) a cooperative agreement between Ohio and the federal government is required prior to bringing a lawsuit under § 9607(a); (3) Ohio had not sustained any "costs of removal or remedial action incurred" within the meaning of the statute; and (4) Ohio had not sustained appropriate damages to its "natural resources." With regard to the first argument the court concluded that the new National Contingency Plan, revised subsequent to the filing of the parties' briefs, rendered the argument moot. The court next concluded that a section 107 lawsuit may be maintained without first entering into an agreement with the federal government for response with the federal government for response costs under section 104. With regard to whether Ohio's complaint sufficiently alleged "cost incurred" as required by section 107(a)(4)(A), the court ruled in the affirmative. Last, the court found Ohio's claim for damages to natural resources pursuant to section 107(a)(4)(c) sufficient.

[77] State of Ohio v. Georgeoff, 562 F. Supp. at 1303.

[78] *Id.*

While agreeing with this principle, the court saw no reason to diverge from the generally accepted principles[79] of retroactivity, in particular its own proposition that

> . . . a statute will not require a retroactive application [merely] because it draws upon antecedent facts for its operation; but it *may not* impose liability based *solely* upon considerations already pass without applying retroactively.[80] (emphasis added)

Ohio failed to allege any post-enactment conduct on the part of BFI and despite well settled principles to the contrary, sought to impose non-retroactive liability for conduct occurring exclusively before CERCLA's enactment.

The cases relied upon by Ohio,[81] in its attempts to persuade the court that other jurisdictions have taken exception to this general proposition, were all distinguishable. One such case cited by Ohio is *United States v. Diamond Shamrock Corp.*,[82] which the *Georgeoff* court distinguished in the following manner:

> Because Diamond Shamrock retained control of the dump *after the date of the statute's passage*, liability could be premised upon continuing to maintain the dump in an improper condition . . .[83] (emphasis added)

All of the cases relied upon by Ohio involved some form of post-enactment conduct, so the statutory applications in those cases were not retroactive.[84] Therefore, courts such as that deciding *Diamond Shamrock*,[85] which prior to *Georgeoff* were faced with constitutional challenges to the imposition of RCRA and CERCLA upon pre-enactment conduct, were able to avoid deciding the retroactivity issue because the plaintiffs alleged some type of post-enactment, continuing activity on the part of the accused.[86]

Justice, on the other hand, recognized the importance of distinguishing pre-enactment from post-enactment conduct. They al-

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[79] *See id.* at 1304. *See also supra* text and notes at notes 58-59.

[80] *Id.* at 1303.

[81] For a list of cases relied upon by Ohio and the court's discussion thereon, *see id.*

[82] *See supra* note 69.

[83] State of Ohio v. Georgeoff, 562 F. Supp. at 1304.

[84] *Id.*

[85] United States v. Diamond Shamrock, No. C80—1857, 12 ENVTL. L. REP. 20189 (N.D. Ohio May 29, 1981).

[86] *See generally* cases cited *supra* note 67.

leged that because the waste had yet to be removed from the site, it constituted a continuing public nuisance and therefore established the requisite post-enactment conduct.[87] In support of its argument, Justice cited a number of cases which, it contended, held that legislation designed to alleviate a continuing public nuisance did not act retroactively.[88] The court rejected this contention because Justice failed to allege any continuing ownership or control by BFI over the site.[89]

In reaching this conclusion, the *Georgeoff* court diverged from the analyses used by other courts facing analogous challenges under RCRA. In *United States v. Price*,[90] for example, the United States District Court for New Jersey, as affirmed by the Third Circuit Court of Appeals, imposed liability pursuant to RCRA upon past operators, who subsequently sold their chemical waste site, for dumping that occurred at the site during 1971-1972, prior to the sale. In finding these parties liable although they were not "presently contributing" to the disposal of wastes, the court stated:

> . . . It is evident that the current leaking of contaminants from the landfill is being contributed to in a large measure by the failure of the Price defendants to store properly the chemical wastes. Certainly, that proper storage should have been done . . . when the wastes were originally deposited in the landfill . . . it cannot be denied that their continued failure to rectify the hazardous condition they created has been and is contributing to the leaking that is now occurring.[91]

Applying the analysis in *Price* to the circumstances in *Georgeoff* it would appear that merely alleging some sort of current, ongoing damage, such as a public nuisance, would be enough to bypass the need for retroactive application; the fact that BFI was not presently exercising any control or ownership over the dump should have been deemed irrelevant.

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[87] State of Ohio v. Georgeoff, *supra* note 68, at 1304. In particular, the Justice Department focused upon the fact that "release or threatened release" was required under 9607(a) to trigger liability. Justice argued that BFI's disposal of the waste materials at the dump constituted continuing "release" until the waste is removed.

[88] *See* Samuels v. McCurdy, 267 U.S. 188 (1924); Chicago & Alton Railroad Company v. Transberger, 238 U.S. 67 (1914); City of Bakersfield v. Miller, 64 Cal.2d 93, 410 P.2d 393, 48 Cal. Rptr. 889 (1966); People of Illinois v. Jones, 329 Ill. App. 503, 69 N.E.2d 522 (4th Dist. 1946).

[89] Ohio v. Georgeoff, 562 F. Supp. at 1305.

[90] *Price I*, 562 F. Supp. at 1055.

[91] *Id.* at 1072.

The *Georgeoff* court had the additional task of determining what presumptions apply in considering whether CERCLA should be interpreted to impose retroactive liability. Appearing to adhere to the notion that retroactive legislation is presumptively invalid,[92] the court stated:

> . . . concepts of fundamental fairness and the policy of construing statutes to avoid constitutional issues have historically resulted in a presumption favoring a prospective only application of a statute.[93]

The court, however, never actually addressed the issue of whether the presumption against retroactivity indeed still existed by concluding that "even if it were to apply the presumption against retroactive application it would find that the presumption had been overridden."[94]

Finally, the court in *Georgeoff* considered whether Congress had overridden the presumption against applying CERCLA retroactively. The court abided by the following standard framework for analyzing the issue of whether Congress intended a particular statute to apply retroactively:

> The Court's analysis must begin with the fundamental rule of law that the meaning and intent of a statute is to be sought first in the language in which it is framed. If that language is plain and unambiguous, then there is no need to enlist the rules of interpretation, and the duty of the Court is

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[92] *See* State of Ohio v. Georgeoff, 562 F. Supp. at 1306-08.

[93] *Id.* at 1306.

[94] *Id.* at 1307. It should be noted that the presumption against retroactivity has arguably been changed to a presumption in its favor. In Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974), for example, the Supreme Court stated that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 711. The *Georgeoff* court, while acknowledging the possibility that the presumption may indeed have changed to one in favor of retroactive legislation, avoided the issue by finding any negative presumption to be overridden in the case of CERCLA. *See id.* at 1307. It is of the author's opinion that even if the court were to apply the *Bradley* standard, retroactive application of CERCLA would still have been permitted. First, in light of the tremendous public health objective of the statute, if any 'manifest injustice' were to be suffered, it would certainly be by those persons whose health and environment were damaged by the improperly disposed waste. Secondly, the legislative history of CERCLA reveals a Congressional intent to apply the statute retroactively. *See infra* text and notes at note 102.

Note also that the *Georgeoff* court rejected Ohio's attempt to classify CERCLA as a remedial statute exempt from a presumption against retroactivity. Ohio v. Georgeoff, 562 F. Supp. at 1306 n. 7. The author disagrees with the court's holding. *See infra* text and notes at notes 153-61.

> to enforce the act according to its terms. . . . [Where] the imperative character necessary to demonstrate retroactive intent cannot be assigned to the words of the act, the Court must then look at the various indicia of Congressional intent.[95]

The court thus began its analysis with an examination of the language of CERCLA.[96] Because CERCLA contains no explicit statements indicating congressional intent to make the statute apply retroactively to cleanup costs,[97] Ohio pointed to a number of CERCLA's provisions and argued for an implied Congressional intent to allow a retroactive application of the Act. In particular, Ohio attempted to persuade the court to infer congressional intent[98] from many of CERCLA's provisions, which are worded in the past tense,[99] and from the statute's references to "inactive" waste disposal sites. Although in disagreement with Ohio as to the "past tense—future tense" interpretation, the court did find

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[95] Ohio v. Georgeoff, 562 F. Supp. at 1308-09 (*quoting*, Windsor v. State Farm Insurance Co., 509 F. Supp. 342 (D.D.C. 1981)).

[96] Ohio, as the party attempting to override the presumption, had the burden of persuasion on the issue of legislative intent. *Id.* at 1309.

[97] *Id.* There are arguably other provisions which, although unrelated to the concept of clean-up costs, by their terms prohibit retroactive application. *See* 42 U.S.C. § 9611(d)(1) which provides: "no money in the fund may be used under subsections (c)(1) and (2) of this section, where the injury, destruction, or loss of natural resources and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980." Note, however, that while this provision does appear to expressly prohibit retroactivity, the prohibition is limited only to response costs from injuries to natural resources and does nothing to limit retroactive application to other types of response costs.

[98] As an example of a reference to abandoned facilities, the court cited 42 U.S.C. § 9601(2)(A)(iii) in which the terms "owner or operator" are defined: "in the case of any abandoned facility," "any person who owned, operated or otherwise controlled activities at such facilities immediately prior to abandonment."

[99] Ohio argued that the wording of § 9607(a), especially subsection (4), which confers liability upon "any person who *accepts* or *accepted* any hazardous substances for transport to disposal or treatment facilities or sites *selected* by such person, from which there is a release . . . ," indicates a Congressional intent to apply the liability provisions of CERCLA retroactively. 42 U.S.C. § 9607(a) (emphasis added).

Ohio principally focused upon the terms "accepts or accepted" and "selected" and argued that the future tense verb "accepts" refers to liability for post-enactment conduct, and the past tense verb "accepted," refers to liability for pre-enactment conduct. The court rejected this argument because when applying Ohio construction to § 9607(a)(3), which only contains a past tense verb, the provision would only apply to conduct occurring prior to CERCLA's enactment. The court concluded that "a more proper view is to read the phrase 'accepts or accepted' from the perspective of the time of a release or threatened release, a view supported by the language of § 9607." *Id.* at 1309-10. The court similarly found unpersuasive Ohio's identical argument with regard to the past tense verb "selected." *Id.* at 1309-10.

these provisions, together with the fact that CERCLA does authorize "reimbursements" for pre-enactment response costs,[100] as indicia, but "not dispositive indicia," of congressional intent to apply the statute retroactively.[101]

Since the statutory language proved too inconclusive, the court turned to an examination of CERCLA's legislative history. Relying upon congressional statements such as, "I believe the clear concensus is that we must clean-up abandoned sites as soon as possible,"[102] the court reasoned that CERCLA section 107(a) undoubtedly was intended to establish retroactive liability for transporters. In order to effectuate this congressional intent, the court concluded, the Superfund must be "supplemented by lawsuits which impose retroactive liability upon transporters."[103]

With its unprecedented holding that CERCLA section 107 may be applied retroactively to hazardous waste transporters, *Georgeoff* appears to be a landmark decision. The court is the first to thoroughly sift through the language and history of CERCLA and render a judicial determination with regard to the issue of retroactivity. Furthermore, the court's analysis of retroactivity substantially strengthens the notion that so long as there exists some post-enactment activity[104] on the part of the alleged violators or some continuing harm resulting from any pre-enactment activity, non-retroactive liability may be imposed. As such, *Georgeoff* reaffirms the analyses used by previous courts which conferred liability upon parties for pre-enactment conduct.[105]

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[100] *See* 42 U.S.C. § 9604(c)(3), which prohibits the President from taking "remedial" actions unless a cooperative agreement between the President and the unaffected state has been entered into and further provides that the affected state under such an agreement shall be granted a *credit* for any documented direct out-of-pocket non-federal funds it had expended before CERCLA's enactment. (emphasis added) Note that the court's reading of this provision is somewhat incorrect as the provision permits a "credit" and does not, as the court so concludes, explicitly permit "reimbursements."

[101] Ohio v. Georgeoff, 562 F. Supp. at 1311.

[102] *Id.* at 1314, *quoting* CONG. REC. § 14,973.

[103] State of Ohio v. Georgeoff, 562 F. Supp. at 1313-14. The court rejected the defendant's argument that the 1.6 billion clean-up fund established by CERCLA and the section 103 authority to recoup monies used for clean-up were the only remedies provided for sites pre-dating the statute. *Id.* at 1313.

[104] As already discussed, the *Georgeoff* court incorrectly appears to limit post-enactment activity to "continuing ownership, possession or control." *Id.* at 1305. *See supra* text and notes at notes 89-91. From the earlier cases, however, it is clear that the present threat of harm to human health or environment is sufficient to constitute a post-enactment activity. *See supra* note 67.

[105] *See supra* note 67.

Upon a closer reading of the opinion, however, its impact is diminished considerably as the court expressly chose not to address the issue of whether such a retroactive application was constitutionally valid.[106] Part IV of this article will now address the *NEPACCO* decision and the issue of whether CERCLA's retroactive application is in fact constitutional.

IV. CONSTITUTIONAL CHALLENGES TO RETROACTIVE APPLICATION OF CERCLA.

A. Due Process As a Challenge to CERCLA's Retroactive Application.

As already discussed, there is no express constitutional prohibition against retroactive civil legislation. Hence, mere retroactivity is not sufficient to render a statute invalid.[107] The retroactive application of CERCLA will only be prohibited if it violates any one of four constitutional protections founded upon notions of due process.

1. The Due Process Clause

The due process clause of the fifth amendment prohibits Congress from depriving any person of property without due process of law.[108] Typically, the retroactive application of CERCLA will be the focus of a substantive due process challenge.[109] A waste contributor held liable under section 107 for the reimbursement of funds expended by the EPA in cleaning up the dumpsite may argue that such liability constitutes a new cause of action for previously lawful activities.[110]

The history of substantive due process challenges can best be described as circular.[111] The 1905 decision of *Lochner v. New York*,[112] wherein the Supreme Court invalidated a New York max-

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[106] The court described the motion as one which "raises issues of statutory construction, albeit issues which have constitutional overtones." It thus recognized BFI's "reserved right to advance a constitutional argument at a later date." *Id.*

[107] Sands, *supra* note 18, at § 41.03.

[108] *See supra* note 11.

[109] *See generally* CMA/Superfund Study, *supra* note 56, at Chapter VI, 35-53.

[110] *Id.* at Chapter VI, 58. Note that if the waste activities were not in fact lawful under existing law, then this constitutionality argument is effectively destroyed. *See infra* text and notes at notes 150-61.

[111] *See generally*, NOWAK, CONSTITUTIONAL LAW, *supra* note 61, at 449.

[112] Lochner v. New York, 198 U.S. 45 (1905).

imum hours law for bakers, represented the start of the substantive due process explosion which resulted in an era of strict judicial scrutiny of economic legislation. In the mid-1930's, however, judicial intervention in economic legislation began to taper off. Today, the use of substantive due process to protect economic and property rights is almost non-existent, and the judiciary has continually deferred to the decision-making of the other branches of government. In the majority of its opinions, the Supreme Court has continued to adhere to a "rational basis" test in reviewing the substance of laws and regulations challenged under the due process clause.[113]

The *NEPACCO* court is the first to render a decision with regard to whether the retroactive application of CERCLA is constitutional under the due process clause.[114] In that case, the United States sought injunctive relief and reimbursement of all costs it had incurred in performing remedial and removal actions at the "Denny Farm" waste disposal site ("waste site") near Verona, Missouri.[115] The complaint, brought pursuant to section 7003 of RCRA and sections 104, 106(a) and 107(a) of CERCLA, was filed against NEPACCO, the waste generator, and against both waste disposal operators and waste transporters.[116] In 1971, the NEPACCO waste products, which included dioxin and toluene,[117]

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[113] NOWAK, CONSTITUTIONAL LAW, *supra* note 61, at 449.

[114] One month after the *NEPACCO* decision, the United States District Court of South Carolina was faced with a retroactivity challenge against CERCLA section 107 in the case of United States v. South Carolina Recycling and Disposal, Inc., No. 80-1274-6, 14 ENVTL. L. REP. 20272 (D.S.C. Feb. 23, 1984). That court held that CERCLA need not be applied retroactively because it is a remedial statute. *Id.* at 20276. For a full discussion of that case and its holding that CERCLA is a remedial statute, *see infra* text and notes at notes 162-67. In the alternative, the court held that even if CERCLA is applied retroactively, it would not violate the due process clause. *Id.* at 20272-77. *See infra* note 133.

[115] *NEPACCO*, 579 F. Supp. at 828.

[116] *Id.* at 827.

[117] Both toluene and dioxin are infamously dangerous chemicals. Acute exposure to toluene predominantly results in central nervous system depression. Symptoms and signs include headache, dizziness, fatigue, muscular weakness, drowsiness, uncoordination with staggering gait, skin parsthesias, collapse and coma. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, OCCUPATIONAL DISEASES. A GUIDE TO THEIR RECOGNITION (1977).

Dioxin has been the subject of numerous cases involving hazardous waste sites. For example, in United States v. Vertac Chemical Corp., 489 F. Supp. 870 (E.D. Ark. 1980) the court stated:

> It is undisputed that dioxin is the most acutely toxic substance yet synthesized by man. The acute toxicity of dioxin (i.e., the effects of repeated, low level exposure over a long period of time) . . . has been the subject of lengthy scientific

were loaded into approximately eighty-five drums, the majority of which were corroded, and transported to the waste site. Upon arrival at the waste site the drums were deposited in a large trench which was then excavated and plowed over with soil. The hazardous contaminants subsequently leached down into the groundwater below the trench and migrated into the area's springs and wells.[118]

The NEPACCO defendants argued, *inter alia*,[119] that the ret-

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> debate and . . . [t]here is evidence that dioxin has produced mutagenic, teratogenic, fetoxic and possible carcinogenic results in low dose levels in various laboratory animals and cell culture tests . . . [n]o level of dioxin exposure other than zero, had been proven to be safe.

[118] *NEPACCO*, 579 F. Supp. at 833.

[119] The *NEPACCO* court also rendered a decision with regard to the following other important issues: First, the court considered whether section 7003 of RCRA applied retroactively to hold past non-negligent off-site generators and transporters liable for the costs incurred in the clean-up of an inactive or abandoned hazardous waste disposal site. After a "thorough review and analysis of the statutory language, case law and legislative history," the *NEPACCO* court held that section 7003 does not apply retroactively. In particular, the *NEPACCO* court followed the opinions of United States v. Waste Industries, 556 F. Supp. at 1303-14, and *Wade I*, 546 F. Supp. at 785. For the court's full discussion of the issue see *NEPACCO*, 579 F. Supp. at 839-43.

Second, the *NEPACCO* court had to determine whether strict liability was the standard to be applied in determining liability under CERCLA. In answering this question in the affirmative, the court relied upon CERCLA's legislative history and statutory provisions. Specifically, the court looked at section 101(32), 42 U.S.C. § 9601(32), CERCLA's definitional section which states: "liable or liability under this chapter shall be construed to be the standard of liability which obtains under [section 311 of the Federal Water Pollution Control Act (FWPCA) . . . 33 U.S.C. § 1321 (1981)]." The *NEPACCO* court held that because "[t]he courts have consistently construed § 1321 as a strict liability provision," CERCLA's liability provisions also should provide for such a standard. *See NEPACCO*, 579 F. Supp. at 843-44.

A third issue included in the NEPACCO case was whether CERCLA provided for the imposition of joint and several liability. The court held that indeed CERCLA did provide for such joint and several liability. However, the court did not determine whether the specific standard was to be found in section 311 of the FWPCA or in the common law of the states.

Id. at 844-45. The court's rationale was as follows:

> Granted this issue may be of pinnacle importance in cases involving numerous generators, transporters, site owners and a different state's law; however, the Court deems it unnecessary to address this issue under the facts of the case at bar, which involve one generator, one transporter and one landowner in the State of Missouri. The Court concludes that the imminent and substantial endangerment posed by the Denney farm site was the act of the defendants working in concert to produce a single indivisible harm and they are therefore jointly and severally liable for the response costs incurred by the plaintiff, and for which plaintiff is entitled to recover. Under this finding, the defendants would be jointly and severally liable pursuant to the law of Missouri. *Id.* at 845.

The *NEPACCO* court's final task was to determine the response costs for which the defendants were liable under sections 104, 106(a), and 107(a). The defendants first argued

roactive imposition of liability pursuant to CERCLA sections 104, 106(a) and 107(a) constituted a violation of the fifth amendment of the due process clause. Disagreeing with this argument, the court followed the analysis of *Georgeoff*.[120] The court began its analysis with the presumption that "legislation is [to] apply prospectively and that it is the plaintiff's burden of proof to show that the statute is to be given a retroactive effect."[121] Relying principally upon *Georgeoff*[122] and its review of CERCLA's legislative history, the court concluded that sections 104 and 107(a) were undoubtedly intended to apply retroactively.[123] The court stated:

> A brief review of the case law and legislative history clearly supports this proposition. It was the precise inadequacies resulting from RCRA's lack of applicability to inactive and abandoned hazardous waste disposal sites that prompted the passage of CERCLA.[124]

In addition to reaffirming Congress' intent to apply sections 104 and 107(a) retroactively, the *NEPACCO* court considered the novel issue[125] of whether section 106(a), CERCLA's "imminent hazard" provision could be applied retroactively to inactive or

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that the plaintiff failed to prove that the costs incurred were reasonable and were "not consistent with the National Contingency Plan." *Id.* at 850. The court placed the burden of proving such an inconsistency on the defendants. The defendants failed to meet this burden of proof and the court thus held that response costs were recoverable. *Id.* at 851. The defendants then alleged that the government could not recover pre-enactment response costs. With this allegation the court agreed and hence the government was able to recover all of its response costs which were incurred after December 10, 1980. *Id.* at 850-52.

[120] *See supra* text and notes at notes 75-106 for discussion of the *Georgeoff* case analysis.

[121] *Id.* at 839.

[122] *NEPACCO*, 579 F. Supp. at 839. The Court also cited as support: U.S. v. Waste Industries, 556 F. Supp. at 1316-17; *Wade I*, 546 F. Supp. at 792-93; *Stepan Chemical Co.*, 544 F. Supp. at 1140-41.

[123] *NEPACCO*, 579 F. Supp. at 839.

[124] *Id.*

[125] The issue whether section 106(a) can be applied retroactively has only been addressed by one other court. *See Wade I* 546 F. Supp at 792-94. See also text and notes at notes 51-55. Note that the government took heed of the Wade I opinion and in 1983 again brought suit against the defendants, but in that subsequent action, the claim was based upon CERCLA section 107. In United States v. Wade (Wade II), 579 F. Supp. 1326 (E.D. Pa. 1983), the court upheld generator liability under sections 104 and 107 and imposed a minimal burden of causation. *See infra* text and notes at notes 184-85 for a discussion of the effect of that ruling in the context of retroactivity. Note, however, that the court did not readdress the issues of retroactive liability under section 7003 and section 106.

abandoned hazardous waste disposal sites.[126] The court, relying upon precedent and the Act's legislative history, provided the following analysis:

> Although the statutory language does not explicitly refer to inactive sites, Congress made this explicitly clear. The Court finds that section 106(a) applies to inactive sites and that the same persons listed as liable under section 107(a) are liable under section 106(a). To read sections 104, 106(a) and 107(a) otherwise would be to emasculate the purpose of CERCLA and the intent of Congress.[127]

After reaching these threshhold conclusions, the court addressed whether the retroactive application of CERCLA was in violation of the fifth amendment of the due process clause. The *NEPACCO* court, like many other courts faced with retroactivity challenges, relied extensively upon *Usury v. Turner Elkhorn Mining Co.*[128] (*Turner Elkhorn*). There, the Supreme Court upheld a statute[129] which imposed liability upon coal industry employers to compensate former employees disabled from black lung disease. The employers argued that the statute violated the due process clause as it obligated them to compensate employees who had terminated their employment prior to the effective date of the Act. The Supreme Court concluded that due process was satisfied because the legislation represented "a rational measure to spread the costs of the employee's disabilities to those who have profited from the fruits of their labor."[130]

According to *Turner Elkhorn*, the parties complaining of a due process violation bear the heavy burden of establishing "that the legislature has acted in an arbitrary and irrational way."[131] The

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[126] *Id.*

[127] *NEPACCO*, 579 F. Supp at 839. *See also* U.S. v. Diamond Shamrock, 12 ENVTL. L. REP. 20819. Note that in U.S. v. Diamond Shamrock the court did not have to address the retroactivity issue because the plaintiffs successfully alleged continuing post-enactment damages. The *NEPACCO* court also relied upon the legislative history of section 106. *NEPACCO*, 579 F. Supp. at 839 n.16, *citing* H. REP. NO. 1016, 96th Cong., 2d Sess. 27-28, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS, 6130-6131.

[128] Usury v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). *See* Comment, *Generator Liability*, *supra* note 30, at 1246-50.

[129] Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 stat. 792, as amended by the Black Lung Benefits Act of 1872, 30 U.S.C. §§ 901-950.

[130] *Turner Elkhorn*, 428 U.S. at 18.

[131] *Id. But see* CMA/Superfund Study, *supra* note 56, at Chapter VI-40 wherein the authors interpret the case to hold that a greater justification is required for retroactive measures.

NEPACCO court applied this "rational means" test and held that CERCLA's "imposition of liability for past acts is rational and satisfies the due process clause of the fifth amendment."[132] The court justified this holding by stating:

> It is clear that Congress intended to have the chemical industry, past and present, pay for costs of cleaning up inactive hazardous waste sites . . . Congress *rationally* considered the imposition of liability for the effects of past disposal practices as a *means* to spread the costs of the clean-up on those who created and profited from the waste disposal-generators, transporters and disposal site owners/operators. (emphasis added)[133]

Although the court based its decision upon a rational-means standard, it did not set forth any assessment of that standard's components. In order to fully justify CERCLA's constitutionality pursuant to a rational-means test a discussion of the factors used by the Supreme Court to determine "rationality" is warranted.

The factors relevant to a judicial assessment of rationality, as distilled from *Turner Elkhorn* and other Supreme Court decisions, were set forth in *Nachman Corp. v. Pension Benefit Guaranty Corp.*[134] At issue in *Nachman* was the constitutionality of the Employee Retirement Income Security Act[135] which required employers to pay pension benefits to all workers presently in their employ as well as to those workers who had terminated employment in the year prior to enactment.[136] After assessing the rationality of the retroactive provisions, the court concluded that

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[132] *NEPACCO*, 579 F. Supp. at 841.

[133] *Id.* at 840-41. The court in *South Carolina Recycling* used virtually identical analysis in reaching the conclusion that even if CERCLA section 107 were considered retroactive it would satisfy the requirements of due process. *South Carolina Recycling*, 14 ENVTL. L. REP. at 20276. Like the *NEPACCO* court, the *South Carolina Recycling* court justified this holding by stating:

> To the extent the CERCLA is considered retroactive, it clearly satisfies the *Turner Elkhorn* standard. Like the statute at issue in *Turner Elkorn*, CERCLA was enacted in response to the threat perceived by Congress to be caused by inactive and abandoned hazardous waste sites . . . . An overriding objective in enacting CERCLA [sic] to spread the economic costs of cleanup operations among 'those responsible for any damage, environmental harm, or injury [resulting from] chemical poisons . . . .'

The liability scheme established under CERCLA is clearly a rational means of achieving this objective. *Id.* at 20277.

[134] *Nachman Corp.*, 592 F.2d at 947.

[135] Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1144 (Supp. 1981).

[136] *Nachman Corp.*, 592 F.2d at 950.

the statute satisfies due process.[137] In that court's opinion, "rationality must be determined by a comparison of the problem to be remedied with the nature and scope of the burden imposed to remedy that problem."[138] In evaluating the nature and scope of the burden, the *Nachman* court considered the following factors:

> (1) the reliance interests of the parties affected;[139]
> (2) whether the impairment of the private interest is effected in an area previously subjected to regulatory control;[140]
> (3) the equities of imposing the legislative burdens;[141] and
> (4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens.[142]

Although not listed by the *Nachman* court, an additional factor to consider in determining rationality is, as stressed in *Turner Elkhorn*, the causal nexus between the legislative justification and the persons upon which retroactive liability is imposed.[143] The following application of these factors to the liability provisions of CERCLA indicates that the Act satisfies due process.

First, an analysis of the reliance interests of the parties affected suggests that the success or failure of that argument is a function of the degree of reliance.[144] In *Turner Elkhorn*, for example, the Court rejected the reliance interests argument as the mine employers had "not specifically pressed the contention that they would have taken steps to reduce or eliminate the incidence of [black lung disease] had the law imposed liability upon them."[145] Hence, opponents of CERCLA must allege that their reliance interests were substantial. A party who is able to demonstrate that they predicated their decision-making, especially those decisions involving great expense, upon prior law is in a better position to challenge CERCLA than a party without such proof. For example, a disposal facility owner may argue that they expended

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[137] *Id.* at 960.

[138] *Id.*

[139] *Id.*, *citing* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); Adams Nursing Home of Williamstown, Inc. v. Mathews, 548 F.2d 1077, 1080-81 (1st Cir. 1977).

[140] *Supra* note 136 *citing* Allied Structural Steel Co. v. Spannaus, 438 U.S. at 234; Federal Housing Administration v. The Darlington, Inc., 358 U.S. 84, 91 (1958).

[141] *Supra* note 136 *citing* Railroad Retirement Board v. Alton Railroad, 295 U.S. 330, 354 (1935); *Turner Elkhorn*, 428 U.S. at 19.

[142] *Id.*

[143] *Turner Elkhorn*, 428 U.S. at 19-20.

[144] *Id.* at 17. *See also* CMA/Superfund Study, *supra* note 56, at Chapter VI-49.

[145] *Turner Elkhorn*, 428 U.S. at 17.

considerable time and money so that their facilities and treatment methodologies would meet the standards required by RCRA section 6924.[146] Moreover, if generators would have known that they would later be held liable for the disposal of waste, they perhaps would have found another viable method of waste disposal.[147]

These arguments, however, lose much of their persuasiveness when the impairment of the public's interest is considered. Indeed, the public's reliance interests upon both the government and the private sector far outweigh the vast contributor's reliance on prior law. While the government protects the public from activities which pose a threat to their health and the welfare of their environment, the private sector is expected to minimize the risks associated with their production activities.[148] This sort of balancing is a common method of determining a retroactive statute's constitutionality. As one commentator has stated:

> Much legislation adjusts the heights of private groups in an attempt to achieve a balance which best serves the 'public purpose,' and many such statutes have been upheld against claims that their retrospective operation was a denial of due process.[149]

A second consideration supporting the rationality of imposing CERCLA retroactively is that the hazardous waste area is one which was previously subject to both federal and state regulatory control.[150] This contention raises an interesting proposition with regard to CERCLA's constitutionality. It is arguable that CERCLA was enacted merely as a remedial statute and therefore, based upon that fact alone, its retroactive application may be sustained.[151] Remedial statutes are enacted to remove ". . . unin-

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[146] 42 U.S.C. § 6924. The regulations promulgated pursuant to this section are codified at 40 C.F.R pt. 122.1 et seq. *See also*, CMA/Superfund Study, *supra* note 56, at Chapter VI-64, wherein the authors also cite section 402(a) of the Clean Water Act, 33 U.S.C. § 1342(a), which required generators to expend considerable amounts of money to upgrade pits, ponds and lagoons used for waste disposal. It is argued that forcing these generators to remove the wastes pursuant to Superfund severely impairs reliance interests.

[147] *See Id.* at Chapter VI-64. *See also*, *Nachman Corp.*, 592 F.2d at 961.

[148] *See Nachman Corp.*, 592 F.2d at 962.

[149] Hochman, *supra* note 58, at 698.

[150] *See supra* text and notes at notes 19-31. *See also Nachman Corp.*, 592 F.2d at 962.

[151] *See generally* NOWAK, CONSTITUTIONAL LAW, *supra* note 61, at 473; Sands, *supra* note 19, at § 41.04; Hochman, *supra* note 58, at 703-06.

tended flaws in existing legislation and help give full effect to the legislative intent behind the initial legislation."[152]

This argument was raised, unsuccessfully, by both Ohio and the Justice Department in *Georgeoff*. Ohio sought to bring CERCLA within the class of remedial statutes and cited a number of cases in support of its conclusion.[153] The court quickly rejected this argument, stating:

> Acknowledging that 'while the distinction between remedial and substantive legislation is rather uncertain . . . [a] remedial statute is generally defined as one which neither enlarges nor impairs substantive rights, but rather relates to the means and procedure for enforcing those rights. It can hardly be contended, however, that this statute involves remedial legislation of this type. CERCLA creates an entirely new procedure for enforcing substantive rights—a procedure which was the purpose for enacting the statute.[154]

Similarly, Justice asserted that environmental statutes, which were designed to remedy continuing threats and injuries to public health, were subject to a different definition of "remedial."[155] In support of its contention, Justice cited *Diamond Shamrock*[156] "as authority for the view that the generous construction required by law for statutes relating to water pollution allows a retroactive application of CERCLA."[157] The court, however, distingushed that case: "The principal thrust of *Diamond Shamrock* is to give a generous construction to the definitional terms of the statute, not the issue of retroactivity."[158]

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[152] NOWAK, CONSTITUTIONAL LAW, *supra* note 61, at 473. *See also* Ohio v. Georgeoff, 562 F. Supp. at 1306 n. 7, wherein the court defined remedial legislation as that which "neither enlarges nor impairs substantive rights, but rather relates to the means and procedure for enforcing those rights."

See, e.g., F.H.A. v. The Darlington, Inc., 358 U.S. at 84, wherein the Supreme Court sustained a retrospective reading of an amendment to the Veteran Emergency Housing Act of 1946. The Court stated that:

> Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. *Id.* (*quoting*, Fleming v. Rhodes, 331 U.S. 100, 107 (1947)).

[153] Ohio v. Georgeoff, 562 F. Supp. at 1306 n.7.

[154] *Id.* at 1305-06 n.7.

[155] *Id.* at 1307.

[156] U.S. v. Diamond Shamrock, 12 ENVTL. L. REP. at 20819.

[157] Ohio v. Georgeoff, 562 F. Supp. at 1307.

[158] *Id.*

It is unfortunate that neither Justice nor Ohio utilized CERCLA's legislative history in support of their arguments.[159] Included in the pre-enactment hearings were discussions regarding the Act's remedial nature. In the Senate Hearings, for example, Thomas Jorling, the Assistant Administrator in EPA's Water and Waste Management Division, stated:

> In addition to creating the fund, the other main goal of the legislation originally was to clarify and codify long-standing common law theories as they relate to liability for damages caused by hazardous waste disposal activities.[160]

Similarly, with regard to the inadequacies of the Clean Water Act in addressing chemical spills, former EPA Administrator Douglas Costle stated:

> The Administration's proposal *does not duplicate existing laws with regard to chemical spills; it incorporates and expands upon them. This expansion is necessary* because—and this applies to oil spills as well as chemical spills—Section 311 of the Clean Water Act, the existing law does not authorize government action for spills onto the ground only, or spills that result only in the release of gases into the air. It also does not adequately cover spills that contaminate only groundwater.
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> . . . the liability provisions of Superfund are not retroactive at all. They *merely codify longstanding common law rules relating to liability for hazardous products and undertakings. Existing common law principles hold that in areas of ultrahazardous activity, liability is attached to any injury resulting directly or indirectly from the activity*. This is true regardless of whether the injury was foreseeable or whether negligence or contributory negligence was involved. (emphasis added)[161]

CERCLA's legislative history suggests that the statute is remedial in nature as it was intended by Congress to alleviate the inadequacies in existing legislation. Indeed, rather than creating a new procedure for enforcing substantive rights, CERCLA merely codifies the existing standards for waste management.

This conclusion was reached by the United States District

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[159] Note that for purposes of statutory construction the most persuasive, although not decisive, sources for determining legislative intent are reports of standing committees. Sands, *supra* note 18, at § 480.06. The quotations cited in this article are of statements made at committee hearings which are less often relied upon by the courts in determining the intent of the legislature. *Id.* at § 48.10.

[160] *Hearings*, *supra* note 40, at 93.

[161] *Letter from EPA Administrator Douglas Costle to Hon. Jennings Randolph*, in S. REP. No. 848, 96th Cong. 2d Sess. 100. (hereinafter cited as *Costle letter*)

Court of South Carolina in *United States v. South Carolina Recycling and Disposal, Inc.*[162] (*South Carolina Recycling*). In that case, the United States instituted an action pursuant to CERCLA section 107, to recover costs of removing hazardous wastes from the surface of the Bluff Road hazardous waste site, located near Columbia, South Carolina. The named defendants were four hazardous waste generators, the two waste-site property owners, a lessee of a portion of the dump site, and the site operator.[163]

The disposal site and property was used by the various defendants from 1972 to 1978. During the course of the dumping operations,

> an environmental hazard of staggering proportions developed. Some 7,200 fifty-five gallon drums of hazardous substances, including materials which are toxic, carcinogenic, mutagenic, explosive, and highly flammable, accumulated at the site. The drums were randomly and haphazardly stacked upon one another without regard to their source or the compatibility of the substances within. Many drums deteriorated to the point that their hazardous contents were leaking and oozing onto the ground and onto other drums. The exposure of these substances to the elements, as well as to other substances with which they comingled, caused a number of fires and explosions and generated noxious and toxic fumes.[164]

Based upon these conditions, the EPA entered into an agreement with twelve waste generators and one transporter to perform remedial activities. The EPA used the Superfund to finance the cleanup of twenty-five percent of the site's surface. Cleanup of the remaining seventy-five percent was undertaken by the aforementioned defendants.[165] The EPA subsequently brought suit under section 107 to recover costs associated with its cleanup activities at the site.

The *South Carolina Recycling* defendants challenged the section 107 claim arguing that CERCLA was impermissibly retroactive and as such was in violation of due process.[166] The court rejected this challenge, reasoning that CERCLA section 107 was intended to be a remedial statute. In particular, the court stated:

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[162] *South Carolina Recycling*, 14 ENVTL. L. REP. at 20272-77. *See supra* text and notes at notes 14, 133.

[163] *Id.* at 20273.

[164] *Id.* at 20274

[165] *Id.*

[166] *Id.* at 20276.

> Although liability under CERCLA is premised in part upon conduct which occurred prior to CERCLA's enactment in 1980, this court does not consider CERCLA 'retroactive' in the constitutional sense as applied to the facts of this case. The plain language of [S]ection 107 of CERCLA makes it quite clear that CERCLA is a broad remedial statute premised upon present and future effects of defendants' past actions—a 'release' or a 'threatened release' of a hazardous substance must occur before any liability attaches.[167]

Applying CERCLA to the facts of that case, the *South Carolina Recycling* court held the statute to be remedial and hence non-retroactive.

The third consideration, relevant to the determination of whether the burden of such liability is irrational,[168] is the basic equities of imposing retroactive liability. In particular, the question becomes one of which party should bear the costs of the necessary remedial action.[169]

This was the only factor considered by *NEPACCO* in the assessment of the rationality of CERCLA's retroactive application.[170] As already discussed, the NEPACCO court's determination that CERCLA was a rational cost-spreading mechanism was based solely upon *Turner Elkhorn*. With regard to this issue in that case, the mine employers argued that the Black Lung Act's cost spreading mechanism was "arbitrary and irrational" as it

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[167] *Id.* The *South Carolina Recycling* court relied extensively upon the decisions under RCRA section 7003 stating:

> Courts interpreting [s]ection 7003 have held that it is not 'retroactive' in nature because its objective is to obtain relief to abate current and future hazardous conditions, notwithstanding the fact that the conditions might be attributable to past acts. *Id.*

The court specifically relied upon United States v. Price, 523 F. Supp. at 1071-72 and United States v. Diamond Shamrock Co., 12 ENVTL. L. REP. at 20819. Note, however, that the courts in these cases focused their attention not so much upon the remedial nature of the RCRA, but rather upon the fact that post-enactment damages existed or threatened to exist. *See supra* text and notes at note 67. *See also* text and notes at notes 67 and 89-91 for the *Georgeoff* court's discussion of this distinction between pre-enactment and post-enactment damages.

Note that the *South Carolina Recycling* court did, in the alternative, turn to a discussion of CERCLA's constitutionality. It held that even if CERCLA was considered retroactive it would clearly satisfy the requirements of due process. *South Carolina Recycling*, 14 ENVTL. L. REP., at 20276-44. *See supra* note 133 for a full discussion of that issue.

[168] *Nachman Corp.*, 592 F.2d at 962.

[169] *See generally* Comment, *Generator Liability*, *supra* note 30, at 1249-50.

[170] *NEPACCO*, 579 F. Supp. at 840-41. *See also supra* text and notes at notes 132-33. *See also South Carolina Recycling*, 14 ENVTL. L. REP. at 20276-77. For a discussion of that court's holding on this issue, *see supra* note 133.

imposed a disproportionately heavy financial burden upon those operators whose former employees had contracted black lung disease. The employers alleged that a more fair and rational method would consist of a tax upon all present coal mine operators.[171] The Supreme Court rejected this argument and stated:

> . . . it was reasonable for Congress to conclude that this liability represented "an actual, measurable cost of . . . the [employer's] business." . . . it is enough to say that the Act approaches the problem of cost-spreading rationally; *whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension* . (emphasis added)[172]

Applying the Supreme Court's analysis to CERCLA, the *NEPACCO* court concluded that the Act's taxing mechanism and liability provisions were a rational cost-spreading scheme.

There are a number of theories which lend support to the *NEPACCO* court's decision. First, pursuant to section 107 the government may recoup cleanup costs from those parties who, whether remotely so or not, bore some connection to the abandoned waste site. As correctly observed by one commentator, "imposing liability for dump site clean-up on past waste generators . . . may be more rational than holding all chemical companies . . . responsible [when they] may have no connection whatsoever to the condition."[173] This conclusion gains support from CERCLA's legislative history. As an Environment and Public Works Committee member stated:

> it is wholly appropriate and equitable for the industries which have benefited most directly from cheap, inadequate disposal practices, and which have generated the wastes which imposed the risks on society to contribute a substantial portion of the response costs. Both the Commerce Committee and Ways and Means Committee agree on this principle.[174]

Similarly, in response to challenges made by the Chemical Manufacturers Association, Douglas Costle commented:

> . . . in terms of equity, the Administration believes that it is less fair for the general taxpayer to bear this financial responsibility than it is for consumers who benefit from the

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[171] *Turner Elkhorn*, 428 U.S. at 18.

[172] *Id.* at 19.

[173] Comment, *Generator Liability*, *supra* note 30, at 1250.

[174] *Hearings*, *supra* note 40, at 229.

> commerce of hazardous substances to do so. Too often the general taxpayer is asked to pick up the tab for problems he or she did not create. Using special fees to differentiate between the general public and those who benefit from specific commercial and industrial practices is widely accepted, not only in our society but throughout the world, and should be used in this case.[175]

In addition, under the CERCLA taxing mechanisms the costs are equally passed on to all industrial sectors generating hazardous substances and wastes.[176] It was reasonable, therefore, for the *NEPACCO* court to conclude that CERCLA's liability and taxing systems constitute rational and equitable cost-spreading mechanisms.

The last consideration set forth in *Nachman* is whether there exists a Congressional attempt to moderate the impact of the liability imposed.[177] When applying this consideration to CERCLA, it is apparent that any challenge to the Act's retroactive imposition of liability must fail. Congress provided both explicit and implicit limitations on a waste contributer's potential liability. First, the strict liability[178] standard under section 107 is subject to defenses of acts of God, acts of war, and certain acts or omissions of third parties.[179] Second, limitations on liability are set forth in section 107(c). These limitations are inapplicable, however, where the pollutor fails to cooperate in the cleanup efforts, where knowing violation of certain regulations is the primary cause of the pollution, or where willful negligence or misconduct has occurred.[180] Finally, section 107(e)(1)(2)[181] of the Act preserves a generator's right to seek indemnification from the transporter in a separate cause of action.

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[175] *Costle letter*, *supra* note 161, at 102.

[176] *Id.*

[177] *Nachman Corp.*, 592 F.2d at 962.

[178] While the term "strict liability" is not used in the Act, CERCLA indirectly provides for the standard of liability by failing to incorporate any defense based upon the exercise of due care. *See generally* Trauberman, *Superfund at Square One: Promising Statutory Framework Requires Forceful EPA Implementation*, 11 ENVTL. L. REP. 10101 (ENVTL. L. INST. 1981). *See also* City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. at 1140; *South Carolina Recycling*, 14 ENVTL. L. REP. at 20274-75. *But see* CMA/Superfund Study, *supra* note 56, at Chapter II.

[179] 42 U.S.C. § 9607(b). *See generally* Mott, *supra* note 5; Hinds, *supra* note 5, at 27-28. *See also*, U.S. v. Reilly Tar, 546 F. Supp. at 1100; City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. at 1135.

[180] *Id.* at § 9607(c)(3).

[181] 42 U.S.C. § 9607(e)(1)-(2). *See infra* text and note at note 221.

Despite these defenses to and limitations upon liability, some commentators have argued that the government's persistence in asserting joint and several liability[182] against all defendants significantly increases the inequities of retroactive liability. In many such cases, it is argued, a number of the defendants have either settled or are insolvent and hence the remaining defendants must shoulder all of the costs of liability.[183] This argument, while at one time a potentially strong challenge to retroactive liability, is currently of little force. Recently, a number of separate federal district courts decided that users of a hazardous waste disposal site are jointly and severally liable to the government for reimbursement of the cleanup expenses unless the individual user can prove both that the harm is divisible and that it is responsible only for a portion of that harm.[184]

The courts, therefore, have applied a most equitable remedy. This method of imposing joint and several liability removes the impossible burden of isolating a particular waste and proving that a particular generator's wastes were released, and yet it also leaves a generator with the ability to absolve itself from liability for all costs of the remedial activities, provided it can prove its pro-rata contribution.[185] This less harsh interpretation of

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[182] The issue of joint and several liability under CERCLA has been the subject of discussion in many law review articles and other publications. *See generally Joint and Several Liability for Hazardous Waste Releases Under Superfund*, 68 VA. L. REV. 1157 (1982); Manatt Study, *supra* note 5, at Chapter IV, 213-18 (includes an excellent overview of joint and several liability under California law); Gulick, *Superfund: Conscripting Industry Support for Environmental Cleanup*, 9 ECOLOGY L. Q. 524, 544-47; Comment, *Generator Liability*, *supra* note 30, at 1265-78.

Hinds, *supra* note 28, at 26-27; Miller, *Defending Superfund and RCRA Imminent Hazard Cases*, 15 NAT. RESOURCES LAW 483, 489-92; Comment, *Unearthing Defendants in Toxic Waste Litigation: Problems of Liability and Identification*, 19 SAN DIEGO L. REV. 891 (1982); Rogers, *The Generators' Dilemma in Superfund Cases*, 12 ENVTL. L. REP. 15049 (ENVTL. L. INST. 1982). *See also Liability, Apportionment and Burden of Proof: Key Legal Issues in Superfund Suits*, 14 ENVTL. RPTR. 440 (BNA); *Government Responds to Industry Challenges to Joint and Several Liability Under Superfund*, 14 ENVTL. RPTR. 138 (BNA).

[183] *See* CMA/Superfund Study, *supra* note 56, at Chapter VI-62.

[184] *See* United States v. Chem Dyne, 572 F. Supp. 802 (S.D. Ohio 1983); *Wade II*, 579 F. Supp. at 1331-34; United States v. A. & F. Materials Co., Inc., 578 F. Supp. 1249, 1252-57 (S.D. Ill. 1984); *South Carolina Recycling*, 14 ENVTL. L. REP. at 20275-76; *But see* United States v. Stringfellow, No. CV-83-2501-MML, 14 ENVTL. L. REP. 20385 (C.D. Cal. Apr. 5, 1984) (Joint and several liability under CERCLA section 107 permitted, but not required. No joint and several liability under CERCLA section 106, RCRA section 7003, Clean Water Act section 504, or SDWA section 1431).

[185] *See* Miller, *supra* note 182, at 491-92.

CERCLA has given defendants the opportunity to limit, if not eliminate, their individual liabilities.

In addition to the *Nachman* considerations already discussed, opponents of retroactive liability under CERCLA rely on *Turner Elkhorn* when arguing that the government must establish an adequate causal connection between the past actions of the waste contributors and the rationale for imposing retroactive liability.[186] It is argued that in *Turner Elkhorn*, the Supreme Court based its decision to uphold the retroactive application of the Black Lung Statute, in part, on the strong causal connection between the mine operators and the dangerous conditions causing black lung disease.[187] The court held that "the [D]ue [P]rocess [C]lause poses no bar to requiring an operator to provide compensation for a former employee's death or disability due to pneumoconiosis arising out of employment in its mines."[188] Waste contributors, particulary waste generators, may thus argue that there is not a sufficient causal nexus between their generation activities and the damages caused by the subsequent dumping of that waste. It can be further argued that many times not all wastes at a site were improperly disposed of and thus, without proof that their particular waste was that which eventually leaked, the generator cannot be held liable.

These arguments, like those under joint and several liability, have been severely weakened by the recent court decision of *United States v. Wade*[189] (*Wade II*). In an unprecedented interpretation of CERCLA, the court rejected the generators' argument that in order to establish liability the government must prove not only a causal nexus between costs incurred in clean-up and a given generator's waste but also that a particular generator's actual waste is presently at the site and has been the subject of a removal or remedial measure.[190] The court ruled that CERCLA section 107 imposes liability on generators upon a showing that (1) they merely disposed of hazardous waste in the facility in question; (2) wastes of the type disposed of are now in the site; (3) there is a release of any hazardous substance; and (4) that

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[186] *See* CMA/Superfund Study, *supra* note 56, at Chapter VI-60.

[187] *Id.* at Chapter VI-41 n. 62.

[188] *Turner Elkhorn*, 428 U.S. at 19-20.

[189] *Wade II*, 579 F. Supp. at 1337-39. *See also South Carolina Recycling*, 14 ENVTL. L. REP. at 20274-75.

[190] *Id.* at 1331.

plaintiff has incurred response costs pursuant to CERCLA.[191] Hence, the court's broad reading of section 107 imposing a minimal burden of proof of causation upon the government certainly obliterates any generator optimism for a narrow standard of liability under that provision.

In light of the above discussion, this Comment concludes that a retroactive application of CERCLA's liability provisions satisfies due process. First, because CERCLA primarily allows new remedies for activities recognized by previous common and statutory law as tortious, it may be classified as a remedial statute and, as such, would not be subject to any limitations upon its retrospective application. This argument, however, would not be a valid one if the pre-enactment activities were lawful under pre-existing regulations. In its alternative, therefore, it may be argued that in light of the additional factors considered it is obvious that any impairment of due process on the part of the defendants is outweighed by the benefits such retroactive liability would confer to public health and safety.[192]

2. The Contract Clause

The United States Constitution contains an unqualified guarantee that the states shall not impair any obligation of contracts.[193] In the case of the federal government, while there is no such express prohibition in the United States Constitution against impairment of contract obligations by federal law, the same protections apply by force of the due process clause in the

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[191] Note that the court in *Wade II* also ruled that limits on government response actions under section 104 do not limit generator liability under section 107. The court also discussed the issue of whether the government might be able to recover costs not yet incurred but postponed ruling on this issue until a determination of the full amount of reimbursable response costs already incurred. *See Id.* at 1338. Third, the court concluded that Congress intended that the courts apply common law principles in determining the scope of liability under CERCLA. *Id.* at 1338.

[192] These conclusions were recently upheld in State Department of Environmental Protection v. Ventron Corp., 440 A.2d at 455. In that case, the New Jersey Supreme Court upheld the retroactive liability provision of that state's own "Superfund." The Court held that because the defendants' pre-enactment actions were in violation of the laws preceding the current Spill Act, the latter was merely a remedial statute. *Id.* at 460. In addition, the Court stated:

> Although retroactive application of a statute may impair private property rights, when protection of the public interest so clearly predominates over the impairment, the statute is valid. In this case, we find that the public interest outweighs any impairment of private property rights. 13 ENVTL. L. REP. at 20837.

[193] *See supra* note 12.

fifth amendment.[194] In any case, the protection against retroactive impairment of contract rights is subject to the same considerations which are applied in determining the legality of retroactive impairment of non-contract rights, under the due process clauses.[195] Thus if it is reasonable for the

> government to regulate or prohibit certain conduct in behalf of public health, ... safety, or general welfare, ... the fact that an otherwise legally binding contract undertaking to do that which is prohibited was entered into prior to the enactment of the prohibition will not save the behavior carried out in performance of the contract from illegality.[196]

In the context of CERCLA, a contract clause violation may be most readily asserted by generators who, despite their contractual transfer of responsibility to the transporters or waste site operators for the proper disposal of the wastes, are now being held strictly liable for the dumping of that waste pursuant to section 107.[197]

As with the due process clause, the Supreme Court's use of the contract clause as a tool to invalidate state and federal legislation that altered private contracts has been cyclical.[198] Under the leadership of Chief Justice John Marshall, the Supreme Court used the contract clause extensively when invalidating statutes "that retrospectively impaired almost any contractual obligation."[199] For example, the Supreme Court of the Marshall era[200] was given its first opportunity to apply the contract clause in *Fletcher v. Peck*.[201] At issue in *Fletcher* was the constitutionality of the Georgia state legislature's repeal of a statutory grant of public land to

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[194] Sands, *supra* note 18, at § 41.07. *See, e.g.*, Fleming v. Rhodes, 331 U.S. 100, 109 (1947) ("Immunity from federal regulation is not gained through forehanded contracts."); *see also* United States v. Northern Pacific Railway, 256 U.S. 51 (1921); WILLIS, CONSTITUTIONAL LAW 577 (1936). Note that for purposes of this Comment, the contract clause limitation will be with regard to federal action as applied through the due process clause.

[195] *Id.*

[196] *Id. See generally*, Calabresi, *Retroactivity: Paramount Powers and Contractual Changes*, 71 YALE L. J. 1191 (1962); Hale, *The Supreme Court and the Contract Clause: I-III*, 57 HARV. L. REV. 512, 621, 852 (1944) (three part series).

[197] *See generally* CMA/Superfund Study, *supra* note 56, at Chapter VI-71.

[198] *See generally* NOWAK, CONSTITUTIONAL LAW, *supra* note 61, at 461-71.

[199] *See also Hale I*, *supra* note 196, at 512 for an in-depth analysis of early Supreme Court contract clause decisions.

[200] John Marshall was a member of the Supreme Court from 1801 to 1835. NOWAK, CONSTITUTIONAL LAW, *supra* note 61, at 1094 (app. A).

[201] Fletcher v. Peck, 6 Cranch (10 U.S.) (1810); *see also* New Jersey v. Wilson, 7 Cranch 164 (1812); Dartmouth College v. Woodward, 4 Wheat 518 (1819); Sturges v. Crowinshield, 4 Wheat 122 (1819); Green v. Biddle, 8 Wheat 1 (1823).

speculators. Peck had purchased some of this land and subsequently resold the acreage to Fletcher. The statutory repeal, however, destroyed Peck's good title to the land; Fletcher demanded a rescission of the contract and reimbursement of all money tendered. Marshall invalidated the state's action as it "interfere[ed] with established business and property interests."[202]

The Supreme Court's expansive reading of the contract clause continued until the latter part of the nineteenth century.[203] The Court's subsequent retreat from the use of the contract clause as a defense for property interests has been attributed to the judiciary's increased reliance upon the doctrine of substantive due process to void such legislation.[204] As opined by one commentator, there was "at least a tendency for the contract clause and the due process clause to coalesce" and that "the results might be the same if the contract clause were dropped out of the Constitution and challenged statutes all judged as reasonable or unreasonable" under due process.[205] In *Lochner v. New York*,[206] for example, the United States Supreme Court based its decision to invalidate the New York statute, which it held to interfere with the right of contract between employer and employee, upon notions of due process.

The Supreme Court ended its long period of contract clause disuse in 1978, with its decision in *Allied Structural Steel Co. v. Spannaus*.[207] At issue in that case was a Minnesota law which required that employees, who had worked in an excess of ten years for a company which had a pre-existing pension plan, be granted benefits upon termination or the closing of a plant re-

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[202] NOWAK, CONSTITUTIONAL LAW, *supra* note 61, at 463 *quoting* Fletcher v. Peck, 10 U.S. at 87. For a discussion of the Fletcher decision see C. McGrath, *Law and Politics in the New Republic*—Yazoo: The Case of Fletcher v. Peck 70 (1966).

[203] *See, e.g.*, Stone v. Mississippi, 101 U.S. 814 (1880); Beer Co. v. Massachusetts, 97 U.S. 25 (1878). During the latter part of the nineteenth century the Supreme Court's "invalidation of state laws impairing contract charter privileges reached its highest frequency. Between 1805 and 1888, there were forty-nine cases in which state laws were held invalid under the contract clause." GUNTHER, CONSTITUTIONAL LAW 557 n.14 (10th ed. 1980), *quoting* U.S. CONST.

[204] NOWAK, CONSTITUTIONAL LAW, *supra* note 61, at 466-67.

[205] *Hale III*, *supra* note 196, at 890.

[206] Lochner v. New York, 198 U.S. at 53; *See supra* text and notes at note 112.

[207] *Allied Structural Steel*, 438 U.S. at 234. *See* United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

gardless of the provision of the employer's plan. In holding this law to be in violation of the contract clause, the Supreme Court considered the following factors:

> (1) whether the impairment of the contract interests was "substantial;"[208]
> (2) the extent of plaintiff-company's reliance upon the pre-enactment pension plan;[209]
> (3) whether the law was necessary to remedy an "important and general social problem;"[210]
> (4) whether the law was a temporary measure to deal with an emergency situation;[211] and
> (5) whether the area regulated was one subject to previous regulation.[212]

The factors of reliance interests[213] and pre-existing regulations[214] were already considered by this Comment and thus, as alluded to earlier, the conclusions reached with regard to non-contractual interests under the due process clause are equally applicable to this contract clause analysis.[215] When applying the remaining considerations it appears that the retroactive application of section 107 would not be invalid under the contract clause.

First, whether the impairment of the contract interests was "substantial" will vary from case-to-case. *Allied Structural Steel*, provides the following standard:

> ... Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the ... legislation.[216]

Assume then that the retrospective application of section 107 completely obliterates all contractual agreements between a generator and its transporter and as such the contract is deemed substantially impaired. In light of the remaining considerations, CERCLA's retroactive application still should be upheld.

CERCLA undoubtedly would satisfy the third factor as it was

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[208] *Allied Structural Steel*, 438 U.S. at 234-35.
[209] *Id.* at 246.
[210] *Id.* at 250.
[211] *Id.*
[212] *Id.*
[213] *See supra* text and notes at notes 144-48.
[214] *See supra* text and notes at notes 150-60.
[215] *See supra* text and notes at notes 194-96.
[216] *Allied Structural Steel*, 438 U.S. at 245.

enacted purposely to remedy "the important and general . . ."[217] problem of abandoned waste sites. In light of the documented environmental and health effects of such sites,[218] it would be difficult to imagine a more rational and necessary purpose for impairing contractual interests.[219]

Finally, although the liability provisions were not enacted temporarily, the dangerous nature of abandoned waste sites may in many situations constitute "emergencies" necessitating immediate legislative attention.[220] Moreover, as already pointed out in this Comment, section 107(e)(1)-(2) preserves a generator's right to seek indemnification from a transporter in a separate cause of action.[221] In short, when balancing the public purpose to be served with the impairment of the contractual interests, the retroactive application should be considered both necessary and rational.

Note that the defendants in *South Carolina Recycling* also challenged the EPA's CERCLA section 107 claim as being in violation of the contract clause.[222] That challenge was not, however, based upon any claims of retroactivity. Nevertheless, the court rejected that claim based upon the following reasoning:

> . . . [E]ven if the [C]ontract [C]lause were construed to apply to CERCLA, the Act has not operated substantially to impair these defendants' waste disposal contracts with [the site owner]. On the contrary, the contracts remain valid and enforceable between the parties. There is nothing to prevent a generator defendant held liable here from seeking indemnity for [the site owner] under their contract.[223]

This rationale should be considered equally applicable to a retroactive claim based upon the same constitutional provision.

3. Takings Clause

The takings clause of the fifth amendment may also be used to challenge the retroactive application of CERCLA as it prohibits the government's taking of private property for public use, without just compensation.[224] With regard to CERCLA, a takings chal-

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[217] *Id.*

[218] *EPA Survey, supra* note 2.

[219] *See Allied Structural Steel*, 438 U.S. at 242-45; *United States Trust*, 431 U.S. at 25.

[220] *See, e.g.*, H. R. REP. No. 1016, 96th Cong., *supra* note 30 at 18.

[221] 42 U.S.C. § 9607(e)(1)-(2). *See supra* text and notes at note 181.

[222] *South Carolina Recycling*, 14 ENVTL. L. REP. at 20276.

[223] *Id.*

[224] *See generally* CMA/Superfund Study, *supra* note 56, at Chapter VI-28-35.

lenge has been alleged by some commentators in the following situations: First, the owners of the property upon which an abandoned waste site is situated may allege that the government's remedial action taken pursuant to section 104 constitutes a taking of their property.[225] Second, an administrative order under section 106 may mandate clean-up measures which result in a complete restriction upon any subsequent use of the property.[226]

As with the general due process and contractual interests already discussed under the due process clause, there is no one uniform test to determine whether there has been an unconstitutional taking. The Supreme Court recently acknowledged this fact in *Kaiser Aetna v. United States*[227] when it stated:

> [T]his Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries.[228]

Indeed, the Supreme Court's utilization of such "ad hoc factual inquiries" has resulted in a variety of standards to determine constitutionality under the takings clause.

The first "general rule" was set forth by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*,[229] a case in which a bill of equity was sought to prevent the Pennsylvania Coal Company from mining under the plaintiff's property in such a way as to remove supports and cause a subsidence of the surface and of the plaintiff's house. The plaintiffs had signed a deed in 1878 which expressly reserved the coal company's right to remove all the coal under the property conveyed, and further stated that the grantee

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[225] *See* CMA/Superfund Study, *supra* note 56, at Chapter VI-75.

[226] *Id.* at Chapter VI-77.

[227] Kaiser Aetna v. United States, 444 U.S. 164 (1979). *See also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295 (1981).

[228] *Kaiser Aetna*, 444 U.S. at 175. Many commentators have also recognized this lack of uniformity and have thus attempted to articulate a general "taking test." *See, e.g.*, Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) (Sax I); Sax, *Takings, Private Property and Public Rights*, YALE L.J. 149 (1971) (Sax II); Berger, *A Policy Analysis of the Takings Problem*, 49 N.Y.U.L. REV. 165 (1974); Dunham, *Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63.

[229] Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922).

received the property with all risks accompanying the purchase of only the surface rights. In addition, the deed also contained an express waiver for all claims of damages which might have arisen out of the mining of the coal.[230] The plaintiffs recognized this waiver but alleged that any rights once belonging to the coal company were removed by the Kohler Act of 1921, which prohibited the mining of anthracite coal in such a way as to cause the subsidence of, among other things, dwelling homes. The coal company alleged this Act to be unconstitutional under the takings clause.[231] In addressing this issue, the Court set forth the following rule:

> [T]hat while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking .... As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is *the extent of the diminution*.[232] (emphasis added)

Based upon this proposition, Holmes declared Pennsylvania's Kohler Act unconstitutional as an undue regulation of the property of the coal company.[233]

Using Holmes' reasoning in *Pennsylvania Coal*, the courts have continued to use a balancing test which weighs "the public benefits of the regulation against the extent of loss of property values."[234] Therefore, legislation or regulatory action will usually be deemed unconstitutional under the takings clause where the balance of private and public interests demonstrates "that the public at large, rather than a single owner must bear the burden of an exercise of [government] power in the public interest."[235]

A variety of criteria have been used by the Supreme Court, either singularly or collectively, when balancing private with public interests.[236] One consideration, as alluded to in *Pennsylvania*

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[230] *Id.* at 412.

[231] *Id.* at 404-12.

[232] *Id.* at 413.

[233] *Id.* at 416.

[234] WRIGHT & GITELMAN, LAND USE 409 (3d. ed. 1981).

[235] CMA/ Superfund Study, *supra* note 56, at Chapter VI-30, *quoting* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); *see also Hodel v. Virginia Surface Mining*, 452 U.S. at 306 n.3 (Powell, J., concurring).

[236] Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962), discussed *infra* text and notes at notes 257-60, is an example of a decision wherein a number of tests were used to determine the constitutionality of a government action.

Coal case, is whether the government action or legislation interferes with reasonable and distinct investment backed expectations.[237] This criteria was recently used by the Supreme Court in *Kaisner Aetna*.[238] In that case the owners of a private pond obtained government approval to convert the pond into a marina. The owner intended to charge non-resident boat owners a fee for the use of the marina. After the construction had been completed, however, the government ordered that the marina be open to the public, as the improvements had connected the pond to public, navigable waters. The Supreme Court disagreed, finding the government's order to be a taking:

> While the consent of individual officials representing the United States cannot "estop" the United States, it can lead to the fruition of a number of *expectancies* embodied in the concept of 'property'—*expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over management of the landowner's property*.[239] (emphasis added)

When applying this theory to CERCLA, opponents of the Act's retroactive application argue that pre-enactment action, or inaction, taken by landowners was based upon their "expectancies" in the existing laws.[240] This argument is without merit for two reasons. First, as noted earlier, waste sites were already subject to extensive regulation under both the statutory system and the common law.[241] Hence it would be unreasonable for a waste contributor to expect that the regulatory system would not change or that such regulations were essentially a permit to pollute. Second, this argument is essentially the same as that discussed earlier under the terminology of "reliance interest." Similarly, therefore, this argument is substantially weakened when these investment-backed expectancies are balanced against the public's "expectancies" in a safe and clean environment.[242]

Another related standard employed by the Supreme Court in deciding cases brought pursuant to the takings clause is whether the government legislation or action denies the landowner any

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[237] *See Penn. v. Mahon*, 260 U.S. at 413. *See also* Berger, *supra* note 228, at 175-77.

[238] *Kaiser Aetna*, 444 U.S. at 174-75.

[239] *Id.* at 179-80. In *Kaiser*, the "expectancy" was deemed to be "right to exclude."

[240] *See* CMA/Superfund Study, *supra* note 56, at Chapter VI-32.

[241] *See supra* text and notes at notes 150-61.

[242] *See supra* text and notes at notes 143-48.

economically viable use of the land.[243] This criteria was considered by the Supreme Court in *Penn Central Transporta tion Co. v. New York City*.[244] At issue in that case was the constitutionality of New York City's Landmarks and Preservation Law. Under that statute law, Grand Central Station, owned by the plaintiff, was designated as a landmark. After the agency responsible for the enforcement of the law denied plaintiff's permission to build a multi-story office building over the existing structure—on the grounds that the proposed building would impair the aesthetic quality of the existing terminal—the plaintiff brought suit under the takings clause.[245] The court rejected the plaintiff's challenge and held that so long as the plaintiffs were not deprived of any reasonably beneficial use of the landmark site, the law would not constitute a taking.[246]

Using this criteria in a CERCLA action, a landowner may argue that the cleanup actions ordered by the EPA or those already implemented by the government has rendered the property economically useless.[247] However, as proponents of the takings challenge to CERCLA have themselves admitted, the prior use of the land as a dump site in and of itself will usually render the property useless for any other purpose.[248] This argument is certainly exemplified by the Love Canal disaster[249] where the dump site was plowed over and, tragically, later sold for purposes of building a school. The land was rendered economically useless, not because of remedial activities taken pursuant to CERCLA, but rather due to the hazardous nature of the improperly dumped wastes.

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[243] Agins v. City of Tiburon, 447 U.S. at 260; Pennsylvania Central Transportation Co. v. New York City, 438 U.S. 104, 138 n.36 (1978). *See also* CMA/Superfund Study, *supra* note 56, at Chapter VI-30.

[244] *Penn Central Transportation*, 438 U.S. at 105.

[245] *Id.* at 115-22.

[246] *Id.* at 122. The court based its decision upon the fact that plaintiff still retained the following "uses" and rights: (1) plaintiffs were entitled to use the property as it had been for the preceding sixty-five years. *Id.* at 136; (2) their continued use of the structure permitted them to profit from the terminal and obtain a reasonable return on their investment. *Id.*; (3) plaintiffs were not prohibited from occupying any airspace as they still had permission to apply for a permit to build a smaller structure. *Id.* at 137; and (4) their air rights were transferable to other structures in the vicinity which were found suitable for such construction. *Id.*

[247] *See generally* Agins v. City of Tiburon, 447 U.S. 255 (1980).

[248] *See* CMA/Superfund Study, *supra* note 56, at Chapter VI-30 n.43.

[249] *See supra* text and notes at note 29.

A third factor often considered by the Supreme Court is whether the interference with the property may be characterized as a permanent physical invasion by the government.[250] Based upon this factor, opponents of applying CERCLA retroactively argue that the government's remedial measures may consist of physical activities which permanently occupy the landowners property and as such constitute a taking.[251] This argument is based upon the holding in *Loretto v. Teleprompter Manhattan CATV Corp.*,[252] where the Supreme Court invalidated a New York law which forced landlords to allow the installation of cable television equipment on their buildings. The Supreme Court deemed such a mandate to be "a *per se* taking" as it constituted a permanent physical occupation of the owner's real property. In light of this "serious form of invasion of an owner's property interests,"[253] the Court did not find it necessary to consider the public benefit resulting from the cable service.

Reliance upon the particular analysis of *Telepromptor* is especially misplaced in the hazardous waste situation. In light of the extreme public health and safety factors involved with a typical abandoned site, the permanent physical occupation of the owner's property would probably be considered not only justifiable, but necessary. This conclusion is soundly based on numerous decisions which have held waste site property owners strictly liable pursuant to both CERCLA and RCRA.[254]

Finally, courts have invalidated government interference with private property using the so-called "noxious-use or harm-benefit" approach.[255] As described by one commentator, a court following this approach

> examines the nature of the use adversely affected by the government regulation or activity to determine whether it is noxious, wrongful, harmful or prejudicial to the health, safety or morals of the public. If so found, then the government may validly regulate it and thereby decrease its value without payment of compensation to the owner.[256]

This approach was followed by the Supreme Court in the case of

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[250] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425 (1982).

[251] *See* CMA/Superfund Study, *supra* note 56, at Chapter VI-33-34.

[252] *Loretto v. Teleprompter*, 458 U.S. at 426.

[253] *Id.*

[254] *See supra* note 67.

[255] *See* Berger, *supra* note 226, at 179-82. *See also* Sax I, *supra* note 226, at 48-50.

[256] Berger, *supra* note 228, at 172.

Goldblatt v. Town of Hempstead.[257] In that case, the plaintiffs, who had engaged in dredging and pit excavations, claimed that an ordinance regulating such operations on property within town limits effectively prevented them from continuing their business and therefore constituted a taking of their property without due process of law. The Court, however, disagreed and held the regulation to be a valid "safety measure."[258] It is significant that although the plaintiffs alleged that the regulation completely destroyed the mining utility of the property, they failed to establish any other uses which would render the property valuable.[259]

The noxious-use approach offers a particularly persuasive rationale for upholding CERCLA's retroactive application under the takings clause. First, the government's remedial or removal actions under CERCLA are taken to protect compelling public health and safety interests; there is, therefore, a direct and reasonable relationship between such actions and the protection of the public health and environment. Second, as noted earlier, the nature of hazardous waste disposal activities renders the property upon which the site was situated economically and physically useless.[260] Consequently, when balancing the public health, safety and welfare purposes underlying government activities brought pursuant to CERCLA, any takings clause challenge to the Act should fail.

B. The Ex Post Facto Doctrine as a Challenge to CERCLA's Retroactive Application

A final constitutional challenge that could be asserted against a limited number of CERCLA provisions is Article I, § 9 of the United States Constitution which forbids the enactment of *ex post facto* laws by the national government.[261] While it is well established that this prohibition is limited in application to retroactive laws of criminal nature,[262] a statute need not, however, be expressly criminal to come within the limitation of the *ex post*

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[257] Goldblatt v. Town of Hempstead, 369 U.S. 590, 592-94 (1962).

[258] *Id.* at 595. Note that this action was brought pursuant to the analogous state due process clause, U.S. CONST. art. XIV.

[259] *See generally* Sax II, *supra* note 220, at 42 for a discussion of this point and of the *Goldblatt* decision in general.

[260] *See supra* text and notes at notes 246-47.

[261] *See generally* Comment, *Generator Liability*, *supra* note 30, at 1246-47.

[262] *See* Calder v. Bull, 3 Dall (3 U.S.) 386 (1798).

facto provision.[263] Hence the following Superfund penalty provisions, if deemed criminal in nature, may constitute a violation of the *ex post facto* doctrine if applied retroactively: (1) section 103(b)(3),[264] which imposes a fine or imprisonment for failure to provide notice of unpermitted releases; (2) section 106(b), which imposes a fine for failure to comply with an administrative order; and (3) section 107(C)(3), which imposes punitive damages for failure to take removal or remedial action ordered by the EPA.

To determine whether a statutory sanction is criminal in nature, for purposes of the *ex post facto doctrine*,[265] the Supreme Court in *DeVeau v. Braisted*[266] set forth the following test:

> The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or *whether the restriction of this individual comes about as a relevant incident to a regulation of a present situation* . . . .[267] (emphasis added)

In *DeVeau* the Supreme Court considered, *inter alia*,[268] the constitutionality of section 8 of the New York Waterfront Commission Act of 1953,[269] which essentially disqualified from holding office in any waterfront labor organization any convicted felon who had not been subsequently pardoned by the Board of Parole. The appellant had been a member of a waterfront labor organization since 1950 and later served both as that group's bargaining representative and also its secretary-treasurer. Three years prior to receiving his membership, however, appellant had pleaded guilty to and received a suspended sentence for a charge of grand larceny. In 1956, three years after the enactment of the Act, the appellant was told that because of his conviction, section 8 of the Act prohibited any person from collecting dues on behalf of his

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[263] See generally Sands, *supra* note 18, at §§ 42.01-.03.

[264] 42 U.S.C. § 9603(b)(3).

[265] Other elaborate tests have been devised by the Supreme Court for purposes of determining whether a statute or provisions thereof is criminal in nature when challenged on the grounds of U.S. CONST. art. I, the right against self-incrimination. *See, e.g.*, Ward v. Coleman, 598 F.2d 1187 (10th Cir. 1979), *rev'd*, 448 U.S. 242 (1980).

[266] DeVeau v. Braisted, 363 U.S. 144 (1960).

[267] *Id.* at 160.

[268] The other issues considered by the Supreme Court in *Deveau* were: (1) whether the provision violated the Supremacy Clause of the U.S. Constitution; and (2) whether it violated the due process clause of the fourteenth amendment.

[269] New York Waterfront Commission Act of 1953, § 6700a (McKinney 1953).

labor organization so long as he remained its officer or agent. As a result of this notification the labor organization suspended appellant as an officer.[270]

Applying the test set forth above, the Supreme Court rejected the *ex post facto* doctrine challenge and stated:

> The proof is overwhelming that New York sought not to punish ex-felons, but to devise what was felt to be a *much-needed scheme of regulation* of the waterfront. (emphasis added)[271]

When applying the *"De-Veau"* test to the Superfund penalty provisions, it would seem that any challenge premised upon the *ex post facto* doctrine must fail. As alleged earlier, the purpose of CERCLA, and hence the purpose for which its penalty provisions are imposed, is regulatory or remedial.[272] Rather than creating new substantive duties, CERCLA merely codifies long standing common law principles. The liability and penalty provisions were established to compensate the costs expended by the government to clean up past disposal practices that today threaten public health and environment. Penalties are thus imposed without reference to *prior* practices or standards; rather they arise solely as a result of *present* conditions.[273] The *ex post facto* challenge is not a novel one as illustrated by comments taken from the Act's legislative history:

> The CMA charge that Superfund constitutes an *ex post facto* denial of due process on the grounds that it somehow broadens liability beyond that which existed at the time wastes were placed in the site, is politically [sic] advocacy, not good law. It is well established that the constitutional prohibition against *ex post facto* laws, with very narrow exceptions, applies only to criminal laws. The relevant provisions of the proposed legislation are not criminal laws. Further, the evolving case law surrounding hazardous chemicals as well as waste desposal sites has recognized that *it is the present condition of the disposal site which must be repaired, regardless of whether the seeds culminating in the condition were sown a number of years ago.*[274]

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[270] *DeVeau, supra* note 266, at 145-46.
[271] *Id.* at 160.
[272] *See supra* text and notes at notes 150-53.
[273] *Costle letter, supra* note 161, at 98; *See also supra* text and notes at notes 151-53.
[274] *Costle letter, supra* note 161, at 98.

In short, because CERCLA may be characterized as remedial in nature and the Act's legislative history is devoid of any reference to criminal liability, challenges based upon the *ex post facto* doctrine will most probably fail.[275]

V. CONCLUSION

As stressed throughout this article, CERCLA's goal is to remedy today's hazardous waste problems caused by yesterday's improper disposal practices. In order to effectuate this congressional purpose it is thus necessary to apply CERCLA to the present effects of past conduct. This was the conclusion reached in *Georgeoff* with regard to pre-enactment transporters of waste materials. That court determined that from CERCLA's legislative history it was clear that the Act was intended to reach activities which took place prior to its enactment.[276] The court's holding did not include, however, a determination of whether such a retrospective application of CERCLA would be constitutional.

In *NEPACCO* the court became the first to expressly rule that not only was it Congress' intent to apply CERCLA retroactively to impose liability for preenactment damages, but it was also constitutional to do so. The *NEPACCO* court based this holding upon a "rationality standard" as set forth in the case of *Turner Elkhorn*.[277]

Yet the *NEPACCO* court did not provide any guidance as to the factors a court should consider when assessing rationality. This article therefore examined these factors, as set forth in *Nachman*, and like the *NEPACCO* court, concluded that the retroactive application of Superfund satisfies the due process clause of the fifth amendment.[278]

Constitutional challeges to CERCLA's retroactive application brought pursuant to the contract clause,[279] the takings clause and the *ex post facto* doctrine, have yet to be addressed by any federal court. This article concludes that any court faced with challenges based upon these constitutional provisions should not

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[275] *Accord*, Comment, *Generator Liability*, *supra* note 24, at 1247.

[276] For a discussion of Ohio v. Georgeoff, *see supra* text and notes at notes 75-105.

[277] *See supra* text and notes at notes 128-33.

[278] *See supra* text and notes at notes 134-92.

[279] *But see South Carolina Recycling*, *supra* text and notes at notes 222-23.

deem such provisions to be obstacles to CERCLA's retroactive application. To hold otherwise would essentially insulate a generator, transporter, dumpsite owner or operator, who in the past benefited from the production and disposal of waste products, from any continuing responsibilities for the present hazards they have created.